65

SC
7848

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,

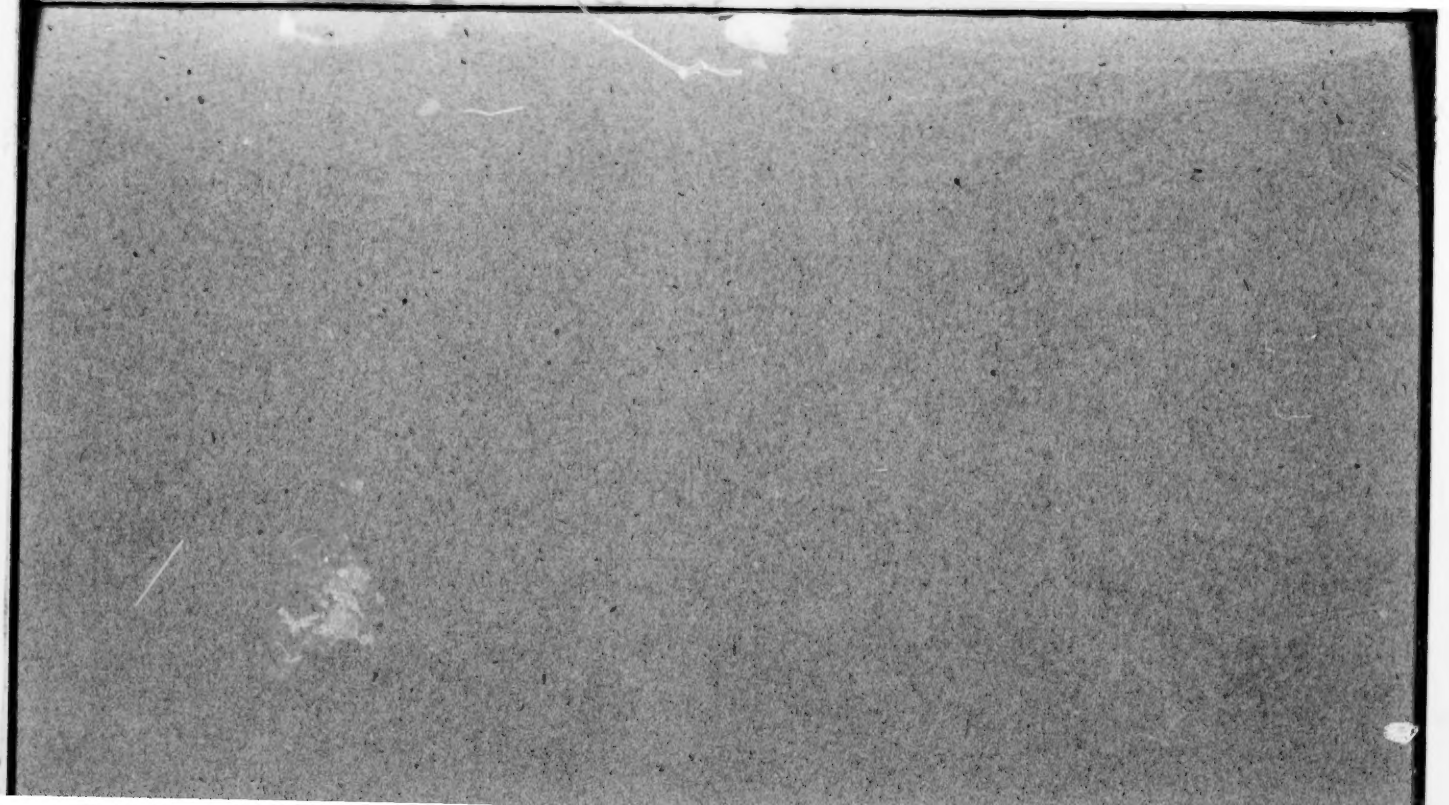
vs.

THE PEOPLE OF THE STATE OF COLORADO ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED NOVEMBER 3, 1905.

(19,951.)



(19,951.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 449.

AMERICAN SMELTING AND REFINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from district court for the county of Denver	1	1
Caption	1	1
Complaint	1	1
Demurrer	9	5
Order taking demurrer under advisement	17	8
Order overruling demurrer	18	8
Answer	18	9
Reply	50	23
Order granting leave to amend answer	74	33
Order taking cause under advisement	74	34
Order for judgment	75	34
Findings and decree	76	34
Appeal	79	36
Appeal bond	79	36
Certificate to record	82	37
Stipulation as to the deposition of Franklin Guiterman	83	38

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 17, 1906.

	Original.	Print.
Deposition of Franklin Guiterman	84	38
Bill of exceptions	101	47
Statement of proceedings	101	47
Testimony of C. W. Waterman	103	48
Further statement of proceedings	104	48
Order for judgment	105	49
Findings and decree	106	49
Exceptions, &c	109	50
Judge's certificate to bill of exceptions	110	51
Assignments of error	111	51
Additional assignment of errors	116	53
Motion for leave to file additional assignment of errors	117	53
Notice of motion for leave to file additional assignment of errors	118	54
Judgment	120	55
Opinion	121	55
Petition for rehearing	138	64
Order denying petition for rehearing	139	6
Petition for writ of error	141	6
Assignments of error	143	6
Writ of error	151	70
Citation and service	154	71
Bond on writ of error	156	72
Clerk's certificate	163	75

In the Supreme Court of the State of Colorado.

leas before the Honorable the Supreme Court of the State of Colorado, sitting at Denver in said State, at a term thereof begun and Held at the Capitol Building in said city on the second Monday of April, A. D. 1905, and of the Independence of the United States the one hundred and twenty-ninth.

Present: Hon. William H. Gabbert, Chief Justice; Hon. Robert . Steele, Hon. John Campbell, Hon. Julius C. Gunter, Hon. Luther . Goddard, Hon. John M. Maxwell, Hon. George W. Bailey, Associate Justices; N. C. Miller, Esq., Attorney General; Richard W. atson, Esq., Bailiff; Horace G. Clark, Esq., Clerk.

Be it remembered that heretofore, and on to-wit, the 2d day of arch, A. D. 1904, there was filed in the office of said Clerk the following transcript of record, bill of exceptions and assignment of errs, which are in words and figures as follows, to-wit:

Pleas in the District Court of the Second Judicial District of the State of Colorado, sitting in and for the City and County of Denver.

Be it remembered, that heretofore, and on, to-wit, the 10th day of ebruary, A. D. 1903, came the plaintiff by its attorney Henry A. indsley, Esq., and filed herein its complaint;
And said complaint is in words and figures as follows, to-wit:

TATE OF COLORADO,
County and City of Denver, formerly a part of the County of Arapahoe.

In the District Court.

HE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,
vs.
MERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Complaint and Information for Writ of Quo Warranto.

Now come the people of the State of Colorado on the relation of Henry A. Lindsley, the district attorney for the Second Judicial District of the said State of Colorado, of his own accord, nd respectfully represents, informs and shows to the court:
1. That relator is the duly elected, qualified and acting district attorney for the Second Judicial District of the State of Colorado;

2. That respondent, the "American Smelting and Refining Co
pany" filed a duly executed certificate, or articles of incorporati
with and in the office of the Secretary of State of New Jersey, on,
wit: the 4th day of April, A. D. 1899, and a duly executed certific
or articles of incorporation with and in the office of the clerk of Hu
son county, in the State of New Jersey, where the principal office
said Company in the State of New Jersey was, by said certificate
articles of incorporation, established on the same day, to-wit, the 4
day of April, A. D. 1899, and thereby, on said day, became a bo
corporate under and by virtue of the laws of the State of New Jer
by the name aforesaid, and is therefore a foreign corporation.

3. That thereafter, and on, to-wit, the 28th day of April, A.
1899, the said respondent, the "American Smelting and Refini
Company" filed with and in the office of the Secretary of State of t
State of Colorado, a certificate signed by its president and s
3 retary, duly acknowledged, designating the City of Denver,
the State of Colorado, as the principal place within the State
Colorado where the business of the said corporation should be carri
on, and also designating and appointing James B. Grant, of the C
of Denver and State of Colorado, as the authorized agent of sa
company, upon whom process may be served; and the said certific
was signed, sealed and acknowledged by the president and secreta
of the said company on, to-wit, the 25th day of April, A. D. 18
and that on said 28th day of April, A. D. 1899, said respondent a
filed with and in the office of the Secretary of State of the said St
of Colorado, a copy of its charter or certificate of incorporation, du
certified and authenticated by the Secretary of State of the said St
of New Jersey, and also a copy — the general corporation law und
which said respondent was incorporated in said State of New Jers
duly certified and authenticated by the Secretary of State of the sa
State of New Jersey, and thereby, on said day, said respondent b
came, and was, authorized, or permitted to do business in the sa
State of Colorado, as such corporation, under and by virtue of t
laws of the said State of Colorado;

4. That by said certificate or articles of incorporation the amou
of the capital stock of the said company was fixed at sixty-fi
4 million dollars ($65,000,000) divided into shares of the p
value of one hundred dollars ($100) each and that thereaf
and on, to-wit, the 8th day of April, A. D. 1901, the said responde
filed in the office of the Secretary of State of the State of New Jers
a duly executed amendment to its said certificate or articles of inc
poration, theretofore filed as aforesaid, and that by said amendme
to said certificate or articles of incorporation the amount of the ca
ital stock of the said company was increased to and fixed at one hu
dred million dolars ($100,000,000) and divided into shares of t
par value of one hundred dollars ($100) each and the amount of t
capital stock of the said company is still fixed at and is one hundr
million dollars ($100,000,000); and that thereafter and on, to-w
the 17th day of May, A. D. 1901, the said respondent filed with a
in the office of the Secretary of State of the said State of Colorado,
copy of the said amendment to its certificate or articles of incorpo

tion, duly certified and authenticated by the Secretary of the said State of New Jersey.

5. That by said certificate or articles of incorporation, said respondent was and is permitted to do business outside and beyond the limits of the said State of New Jersey, and by said certificate, signed, sealed and acknowledged by the president and secretary of
5 said respondent corporation, on, to-wit: the 25th day of April, A. D. 1899, and filed in the office of the Secretary of State of the State of Colorado, on, to-wit: the 28th day of April, A. D. 1899, the principal office and place of business of said respondent corporation within the State of Colorado, is fixed and located, and still is, in the City of Denver, in the State of Colorado.

6. That by said certificate or articles of incorporation, said respondent was and is authorized and empowered, among other things, to carry on a general ore reduction, milling, sampling, smelting and mining business, and does not come and is not within any of the classes of corporations excepted or exempted from liability for, or the payment of, the annual State corporation license tax hereinafter referred to.

7. That from the time of the filing, on, to-wit: the 28th day of April, 1899, of the said certificate by the president and secretary of the said respondent corporation, dated the 25th day of April, A. D. 1899, and the filing on, to-wit: the 28th day of April, A. D. 1899, of the said copy of its charter or certificate of incorporation, and of the duly certified and authenticated copy of the general corporation law of the said State of New Jersey, under which it was incorporated, the said corporation has been, and still is, doing business as
6 such corporation in the said State of Colorado.

8. That under and by virtue of the provisions of an Act entitled "An Act in relation to public revenue and repealing all previous acts, or parts of acts, in conflict therewith," approved March 22, A. D. 1902, it is provided among other things, that in addition to all other fees and taxes provided for by law, every foreign corporation except those chartered strictly for educational, social, literary, scientific, religious or charitable purposes or ditch or irrigation corporations, whose property is exempt by law from taxation, or those incorporated as Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies, incorporated under the laws of the State of Colorado, and those whose shares of capital stock are less than one dollar ($1.00) per share par value, shall pay on or before the first day of May of each year, an annual State corporation license tax to the Auditor of the State of Colorado, as follows: Four (4) cents upon each one thousand dollars ($1,000) of its capital stock, and that every foreign corporation which shall fail to pay such tax shall, by reason of such failure, forfeit its right to do business within the limits of this State, until such tax is paid.

9. That under and by virtue of the provisions of said Act,
7 there was due from said respondent and payable to the Auditor of the State of Colorado, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000), which, though notified by the Auditor of State of

the time of payment of such tax, as required by said Act, the said respondent wholly failed, neglected and refused to pay.

10. That thereafter, and on, to-wit: the 29th day of May A. D. 1902, the Auditor of State of the State of Colorado, within the time required by the said Act, notified, in writing, the said respondent that by failure to comply with the requirements of said Act, it had forfeited its charter or right to do business within the State of Colorado, and further advised said respondent how it could be relieved from said forfeiture, but, notwithstanding such notice, and the requirements of said Act, the said respondent has never paid said tax, and still neglects or refuses to pay the same, or any part thereof.

11. That by the provisions of the Act aforesaid, and the failure of the respondent to pay the said annual State corporation license tax aforesaid, the said respondent has forfeited its right to do business within the limits of the State of Colorado, and that since the first day of May, A. D. 1902, and for more than nine months last past, said respondent has exercised, and still continues to exercise,
8 the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law, and therefore has usurped and still usurps the same.

Wherefore, relator prays due process of law in this behalf, to make the respondent answer to the people of the State of Colorado by what warrant it claims to have, use and enjoy the powers, privileges and franchises aforesaid, and the right to do business as such corporation within the limits of the said State and why the said franchise and charter should not be adjudged forfeit- and the respondent ousted of the same, and for judgment against said respondent for costs and for such other and further relief or judgment as to the court may seem right and proper.

HENRY A. LINDSLEY,
District Attorney for the Second Judicial District and Judicial District Constituted by City and County of Denver.

N. C. MILLER,
Attorney-General.
HENRY J. HERSEY AND
I. B. MELVILLE,
Of Counsel.

(Endorsed:) No. 35293. In the District court. The People of the State of Colorado, Plaintiff, *vs.* American Smelting & Re-
9 fining Company, a corporation, Respondent. Complaint and information for Writ of Quo Warranto. Henry A. Lindsley, District Attorney; N. C. Miller, Attorney General. Henry J. Hersey, L. B. Melville, Of Counsel. Filed in District court, Arapahoe county, Colo., Feb. 10, 1903, Otis B. Spencer, Clerk.

And afterwards, and on, to-wit, the 3rd day of March, A. D. 1903, came the defendant by its attorneys, Messrs. Wolcott, Vaile & Waterman, and filed herein its Demurrer;

And said Demurrer is in words and figures as follows, to-wit:

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Demurrer of the Respondent to the Complaint and Information for a Writ of Quo Warranto.

The defendant in the above entitled cause demurs to the
10 complaint and information therein, upon the following grounds:

I.

That said complaint and information does not state facts sufficient to constitute a cause of action against this defendant.

II.

That said complaint and information does not state facts sufficient to constitute a cause of action against this defendant as to each and all of the following particulars hereinafter set forth, to-wit:

1. That the Act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, in so far is it purports to provide by Section 66 thereof, for a forfeiture of the right of a corporation to do business within the State of Colorado, attempts to cover a subject not relating to public revenue, and a subject different from any other subject contained in said Act, and the same is not expressed in the title thereof, and the said Act as to the provisions of said Section 66 is in violation of Section 21 of Article V of the Constitution of the State of Colorado.

2. That the said Act entitled: "An Act in relation to
11 public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, is in violation of Section 3 of Article X of the Constitution of the State of Colorado.

3. That it appears by the allegations of the complaint and information herein that prior to the time of the passage and approval of the said Act of March 22, 1902, this defendant had lawfully obtained and was then lawfully exercising the right and privilege to transact and carry on business within the limits of the State of Colorado; that the said Act of March 22, 1902, by Section 64 thereof, exempts domestic corporations having a capital stock of less than

$25,000 from the "annual State corporation license tax," by said Act provided; that every domestic corporation having a capital stock of $25,000 or over is by said Act required to pay two cents on each $1,000 of its capital stock, as such annual State tax, and by Section 65 of said Act it is provided that every foreign corporation which had theretofore obtained the right and privilege to transact and carry on business within the limits of the State of Colorado should pay four cents on each $1,000 of its capital stock as such annual tax. And this defendant represents unto the court that the *the* taxes provided for by said Act are not uniform upon the same class of subjects within the limits of the authority levying the said tax,
12 and that said Act does not prescribe such regulations as shall secure a just valuation of all property real and personal, and that said Act of March 22, 1902, as to the provisions of Sections 64, 65 and 66 thereof, is in violation of Section 3 of Article X of the Constitution of the State of Colorado.

4. That said act of March 22, 1902, in so far as it purports to provide by Section 66 thereof for a forfeiture of the right of a corporation to do business within the limits of the State of Colorado, attempts to deprive persons of property without due process of law and is in violation of Section 25, of Article II of the Constitution of the State of Colorado.

5. That said Act of March 22, 1902, impairs the obligation of contracts, and is in violation of Section 11 of Article II of the Constitution of the State of Colorado.

6. That it appears by the allegations of the Complaint and Information that prior to the passage and approval of the said Act of March 22, 1902, and on, to-wit, the 28th day of April, 1899, this defendant having then an authorized capital stock of $65,000,000, complied with the then existing laws of the State of Colorado and filed a certified copy of the laws of the State of New Jersey, under which it was organized, and certified copy of its Articles of Incorporation, and certificate of appointment of agent, with the
13 Secretary of State of the State of Colorado, which it could do only upon the payment of the sum of $9,792.50, under the provisions of an Act entitled "An Act concerning corporations," approved April 13, 1897; and it further appears by said complaint and information that thereupon this defendant became and was authorized to do business in the State of Colorado; that it further appears from the allegations of said complaint and information that on or about the 17th day of May, 1901, and before the passage or approval of the said Act of March 22, 1902, this defendant filed with the Secretary of State of the State of Colorado its certificate of increase of its capital stock, fixing the aggregate capital thereof, at $100,000,000, which filing could only be made upon the payment of the further sum of $5,250. And this defendant represents unto the court that by the payment of the said sums, aggregating $15,042.50, and by compliance with the laws of the State of Colorado then existing, this defendant acquired the contract right to carry on its business in the State of Colorado, and is entitled to the protection of Section 11 of Article II of the Constitution of the State of Colorado

against any attempt to declare a forfeiture of its said right so to do business in said State, and that the said Act of March 22, 1902, in so far as it purports to work a forfeiture of this defendant's right so to carry on its business in the State of Colorado, impairs
14 the obligations of said contract and is null and void.

7. That said Act of March 22, 1902, in so far as it purports by Section 66 thereof to provide that the failure of a corporation to pay the tax provided for in Sections 64 and 65 of said Act may be pleaded and maintained as an absolute defense to any and all actions, suits, or proceedings at law or in equity brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of the State of Colorado until such tax is paid, is in violation of Section 6 of Article II of the Constitution of the State of Colorado.

8. That said Act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," approved March 22, 1902, in so far as it purports to provide by Section 66 thereof for a forfeiture of the right of a corporation to do business within the State of Colorado, attempts to deprive persons of property without due process of law, and is in violation of paragraph 1 of Article XVI of the Amendments to the Constitution of the United States.

9. That said Act of March 22, 1902, impairs the obligation of contracts, and is in violation of clause 1 of Section X of Article I of the Constitution of the United States.

15 10. That it appears by the allegations of the complainant and information that prior to the passage of the Act entitled: "An Act in relation to public revenue, and Repealing all previous Acts, or parts of Acts, in conflict therewith," approved March 22, 1902, and on, to-wit, the 28th day of April, 1899, this defendant, having then an authorized capital stock of $65,000,000, complied with the then existing laws of the State of Colorado and filed with the Secretary of State of the State of Colorado, certified copy of the laws of the State of New Jersey, under which this defendant was organized, and a certified copy of its Articles of Incorporation and its appointment of agent upon whom process could be served, which filing could only be made by it upon the payment to the said Secretary of State of the State of Colorado of the sum of $9,792.50, under the provisions of an Act entitled: "An Act concerning corporations," approved April 13, 1897. That it further appears from the allegations of the complaint and information that on or about the 17th day of May, 1901, and before the passage of the said Act of March 22, 1902, this defendant filed with the Secretary of State of the State of Colorado its certificate of increase of its capital stock, fixing the aggregate amount thereof at $100,000,000, which filing it could make only upon the payment of the further sum of $5,250. And this defendant represents unto the court that by the payment
16 of the said sums aggregating $15,042.50, and by compliance with the laws of the State of Colorado then existing, this defendant acquired the contract right to carry on its business within the limits of the State of Colorado, and that it is entitled to the pro-

tection of clause 1 of Section X of Article I of the Constitution of the United States against any attempt to declare a forfeiture of its said right so to do business within the said State of Colorado, and that the said Act of March 22, 1902, in so far as it purports to work a forfeiture of this defendant's right to so carry on its business within the limits of the said State of Colorado, impairs the obligation of said contract and is null and void.

WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

(Endorsed:) No. 35298. District Court City and County of Denver. The People of the State of Colorado *ex rel* Henry A. Lindsley, District Attorney for the Second Judicial District, Plaintiff, *vs.* The American Smelting and Refining Company, a Corporation, Respondent. Demurrer of the respondent to the Complaint and Information for a Writ of Quo Warranto. Filed in District Court City and County of Denver, Mar. 3, 1903, Otis B. Spencer, Clerk. Wolcott, Vaile & Waterman, Denver, Colorado.

And afterwards, and on, to-wit, the 24th day of June, A. D.
17 1903, the same being one of the regular juridical days of the April Term, 1903, of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel* H. A. LINDSLEY ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

At this day come the parties hereto by their attorneys respectively; and thereupon this cause coming on to be heard upon the demurrer of the respondent to the complaint and information for a writ of *quo warranto* herein, is argued by counsel, and the court not being sufficiently advised in the premises, doth take the same under advisement for its further consideration.

And afterwards, and on, to-wit, the 17th day of August, A. D. 1903, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel* HENRY A. LINDSLEY ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

18 This cause having heretofore been submitted to the court upon the demurrer of said respondent to the complaint and information and by the court taken under advisement, and the court

being now fully advised in the premises, doth overrule said demurrer; and on motion of respondent, it is ordered by the court that time and until thirty days from this day be allowed said respondent within which to answer the complaint and information herein, or within which to elect.

And afterwards, and on, to-wit, the 16th day of September, A. D. 1903, came the respondent by its attorneys, Messrs. Wolcott, Vaile & Waterman, and filed herein his answer;

And said answer is in words and figures as follows, to-wit:

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

19 *Answer to the Complaint and Information.*

Comes now the respondent, American Smelting and Refining Company, and for answer to the complaint and information herein, alleges and says:

That the respondent, American Smelting and Refining Company, is now and ever since the 4th day of April, A. D. 1899, has been a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, authorized by its articles of incorporation to transact the business therein specified not only within the limits of the said State of New Jersey, but also in the various other States of the United States and Republic of Mexico and elsewhere.

That on or about the 28th day of April, A. D. 1899, the respondent, being a corporation as aforesaid, pursuant to the Statutes of the State of Colorado in such case made and provided, and in strict compliance with all the laws and statutes of the said State of Colorado then existing relating to the doing of business within the said State of Colorado by foreign corporations did file with and in the office of the Secretary of State of the State of Colorado a copy of its charter or certificate of incorporation duly certified and authenticated by the Secretary of State of the said State of New Jersey, and also a copy of the general incorporation laws of the said State of New Jersey

20 under and by virtue of which the respondent was incorporated as aforesaid, duly certified and authenticated by the said Secretary of State of the said State of New Jersey, and paid as fees to the said Secretary of State of the State of Colorado for the

leave, permission and right to do business within the limits of the State of Colorado for the full period of twenty (20) years from and after the 28th day of April, A. D. 1899, the full sum of nine thousand, seven hundred ninety-two dollars and fifty cents ($9,792.50), under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, entitled: "An Act Concerning Corporations," approved April 13, 1897.

That on said 18th day of April, A. D. 1899, the respondent did also file with and in the office of the Secretary of State of the State of Colorado, a certificate signed by its president and secretary, duly acknowledged, designating the City of Denver, then in the County of Arapahoe, in the State of Colorado, as the principal place of business of the respondent within the said State of Colorado, and also designating and appointing one James B. Grant, then a resident of the said city of Denver, as the authorized agent of the respondent upon whom process might be served; that the said certificate last aforesaid was signed, sealed and acknowledged by the president and secretary of the respondent on, to-wit: the 25th day of
21 April, A. D. 1899, and that for the filing of the said certificate last aforesaid the respondent paid all the fees required of the respondent by the statutes and laws of the State of Colorado, for filing the same.

That on the said 28th day of April, A. D. 1899, the respondent also filed in the office of the recorder of deeds of the County of Arapahoe in the State of Colorado, the county within which the city of Denver was then situated, a certificate duly signed, sealed and acknowledged by the president and secretary of the respondent, in and by which the said city of Denver was designated as the principal place where the business of the respondent should be carried on in the said State of Colorado, and in and by which the respondent duly appointed one James B. Grant, then a resident of the said city of Denver, as its authorized agent upon whom process might be served, and that for the filing of said certificate last aforesaid the respondent paid all the fees required of the respondent by the statutes and laws of the State of Colorado for filing the same.

That upon the said 28th day of April, A. D. 1899, the respondent filed each and every paper, certificate, statute and law then necessary or required by the laws and statutes of the State of Colorado, and paid all the fees then required by the existing statutes and laws of the State of Colorado for the leave, license, privilege and right
22 to transact its business within the said State of Colorado.

That by reason of the filing of the said papers, statutes and laws aforesaid, and the payment of the fees aforesaid, the respondent was permitted and authorized by the State of Colorado to transact its business within the said State of Colorado as a foreign corporation, under and by virtue of the laws of the said State of Colorado then existing, and by virtue of full, complete and strict compliance with all the laws and statutes of the State of Colorado then existing in relation to the doing of business within the said State of Colorado by foreign corporations.

That on the said 28th day of April, A. D. 1899, the authorized

capital stock of the respondent was the sum of sixty-five million dollars ($65,000,000), divided into shares of the par value of one hundred dollars ($100) each.

That thereafter and on, to-wit, the 8th day of April, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the State of New Jersey, in full compliance with the laws of the said State of New Jersey, a duly signed, sealed and acknowledged amendment to its certificate of incorporation, and by said amendment increased the amount of the capital stock of the respondent from sixty-five million dollars, ($65,000,000) to one hundred million dollars ($100,000,000), divided into shares of the par value
23 of one hundred dollars ($100) each; that the amount of the capital stock of the respondent is still fixed and remains at the sum of one hundred million dollars ($100,000,000).

That thereafter and on, to-wit, the 17th day of May, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the said State of Colorado a copy of the said amendment to its said certificate of incorporation duly certified and authenticated by the Secretary of State of the said State of New Jersey, and then and there paid to the said Secretary of State of the State of Colorado, as fees, the full sum of five thousand two hundred and fifty dollars ($5,250), in full and strict compliance with each and every law and statute of the State of Colorado then existing, relating to the doing of business in the said State of Colorado by foreign corporations.

That on the said 17th day of May, A. D. 1901, the respondent also filed with and in the office of the recorder of deeds of the said county of Arapahoe a copy of the said amendment, duly certified and authenticated by the said Secretary of State of the State of New Jersey, and paid to the said recorder of deeds of the said county of Arapahoe the fees then required by law for such filing.

That thereupon and on, to-wit, the 21st day of May, A. D. 1901, the Secretary of State of the State of Colorado, being there-
24 unto duly authorized by the statutes and laws of the said State of Colorado in such case made and provided, the respondent having then and there fully and strictly complied with all the laws and statutes of the State of Colorado then existing in relation to the doing of business in the State of Colorado by foreign corporations, did execute and deliver to the respondent a certificate of authority under his hand and under the great seal of the State of Colorado, reciting and certifying that the respondent had made full payment of all fees prescribed by law to be paid to the Secretary of State of the State of Colorado and due at the time of the issuance of said certificate of authority, and therein and thereby reciting that the respondent was authorized to exercise any corporate powers provided for by law. And this respondent says that it was then and there authorized and empowered by the said State of Colorado to transact and carry on its business within the said State of Colorado for the full period of twenty (20) years.

That the said certificate of authority, so authenticated and issued to the respondent, as aforesaid, was and is in the words and figures as follows, to-wit:

"STATE OF COLORADO:

OFFICE OF THE SECRETARY OF STATE.

Certificate of Authority.

25 "I, David A. Mills, Secretary of State of the State of Colorado, do hereby certify that, the American Smelting and Refining Company, under and by virtue of the provisions of 'An Act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain Acts and all Acts, and parts of Acts, in conflict herewith, approved April 6, 1901, have made, signed, acknowledged, and this twenty-eighth day of April, A. D. 1899, at the hour of 11:30 o'clock a. m., filed in my office their Certificate of Incorporation.

Now, therefore, Pursuant to the provisions of Section 10, of said Act, I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State, and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law.

In testimony whereof, I have hereunto set my hand and affixed the great seal of the State, at the city of Denver, this twenty-first day of May, A. D. 1901.

[Seal of the State of Colorado.]

DAVID A. MILLS,
Secretary of State."

That at the time of the execution and issuance of said certificate of authority, David A. Mills was the duly elected, qualified and
26 acting Secretary of State of the State of Colorado.

Respondent further alleges that the Thirteenth General Assembly of the State of Colorado convened in extra session at the Capitol on the 27th day of January, A. D. 1902, and thereafter attempted to pass, and pretended to pass, a certain statute or act entitled: "An Act in relation to public revenue, and repealing all previous Acts or parts of Acts in conflict therewith," that the said pretended Act last aforesaid was approved on, to-wit, the 22nd day of March, A. D. 1902.

That in and by said Act it was attempted to be provided, among other things, that each and every foreign corporation which had theretofore obtained, or which should thereafter obtain, the right and privilege to transact and carry on business within the State of Colorado should, in addition to the fees and taxes then provided for by law, and as a condition precedent to its right to do, or continue to do, business within the limits of the State of Colorado, pay annually on or before the first day of May of each year to the Auditor of State of the State of Colorado a State license tax, so called, of four (4) cents upon each one thousand dollars ($1,000) of its capital stock; and it was also attempted to be provided and enacted in said pretended Act, that in the event any corporation should neglect or

fail to pay such tax, within a certain time in said pretended
27 Act specified, such corporation, whether it had theretofore obtained the right and privilege to transact and carry on its business within the limits of the State of Colorado or not, should forfeit its rights to do business within the limits of the State of Colorado until such tax should be paid, and should be absolutely and wholly deprived of all its rights and privileges so to do business within the limits of the State of Colorado, and that the fact of such failure to pay such tax might be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of any such defaulting corporation in any court of competent jurisdiction within the limits of the State of Colorado, until such tax should be paid.

That the parts and portions of the said pretended Act, so approved as aforesaid on the 22nd day of March, A. D. 1902, providing for and relating to the said tax and the penalties for the non-payment thereof, appear in said act last aforesaid as Sections 64, 65, 66, 67 68 and 69 of said Act last aforesaid, and said sections of said Act last aforesaid were and are in the words and figures as follows, to-wit:

"SEC. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation
28 from this State, and having a capital stock of $25,000,00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado, as follows:

Two cents upon each one thousand dollars of its capital stock."

"SEC 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this State, pay annually, on or before first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a State license tax as follows:

"Four cents upon each one thousand dollars of its capitaal stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

29 "SEC. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or main-

tained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

"SEC. 67. It shall be the duty of the State Auditor, immediately on the passage of this Act and on or before the first day of February annually hereafter in each year, to notify every corporation liable to tax hereunder, of the time of payment of such tax, and such notice shall contain a copy of this section and of Sections 64, 65 and 66."

"SEC. 68. It shall be the duty of the State Auditor within thirty days after the first day of every May, to notify in writing all such corporations as have forfeited their charters or their rights to do business within the State of Colorado, under the provisions of the foregoing sections, and any such corporation which shall, at any time after such notice, pay to the auditor the tax payable on or before the first day of May of that year and ten per cent. of said tax in addi-
30 tion thereto, for every six months or fractional part of six months, from the date of said notice, shall thereupon be relieved from the forfeiture of its charter or right to do business within the said State, by reason of such failure.

Nothing in Sections 64, 65, 66 and 67 shall be construed as imposing a license tax upon corporations chartered strictly for educational, social, literary, scientific, religious or charitable purposes, or ditch or irrigation corporations whose property is exempt by law from taxation, or upon charters incorporating Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies. But insurance companies not capitalized shall pay a yearly tax of one dollar per thousand on the gross premiums collected in this State, in addition to the other taxes and fees provided by law. Provided, That nothing in Sections 64, 65, 66 and 67 contained, shall be construed as applicable to organizations which conduct their business as fraternal societies on the lodge system, or which limit their certificate holders to a particular secret order or fraternity.

The auditor of the State shall, within thirty days after the receipt of any moneys collected by him under the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the State, and shall take, at the time of such payment, a receipt or receipts from the State treasurer, showing upon its
31 face the exact amount of such moneys paid to said treasurer, and on what account and from what source the same was derived. The fees provided for in Sections 64 and 65 are in addition to the other fees and taxes provided by law."

"SEC. 69. For the purpose of the foregoing tax the fiscal year for basing such tax shall begin with May first of each year, and end with April thirtieth of the succeeding year, and that the foregoing prescribed tax shall apply to each fiscal year, or fractional part thereof."

That the only sections in said Act, so approved as aforesaid on the 22nd day of March, A. D. 1902, in any way whatever relating to the said tax are the said sections numbered from Section 64 to Section 69, both inclusive.

Respondent further says that the complaint or information herein is predicated and founded upon the aforesaid provisions and sections,

and none other, of the said pretended Act, so approved as aforesaid on the 22nd day of March, A. D. 1902.

Respondent further says that prior to the time of the attempted passage or approval of the pretended act last aforesaid specified, the respondent had complied in every respect, fully and completely, with every requirement of every law and every statute of the
32 State of Colorado in relation to the doing or transacting of business within the limits of the State of Colorado by foreign corporations, and had paid in full all the fees and charges, of every kind and character, required to be paid by the then existing laws and statutes of the State of Colorado by foreign corporations for the privilege and right to do business within the limits of the State of Colorado, and had filed all the certificates, papers, laws and statutes required by any law of the State of Colorado then existing in that behalf, with the proper officers in the said State of Colorado.

That by virtue of the full and complete compliance with all the laws and statutes of the State of Colorado relating to the doing of business by foreign corporations within the State of Colorado, the respondent became and was by the State of Colorado fully authorized and empowered to transact and carry on its lawful business within the limits of the State of Colorado for the full period of twenty (20) years from and after the 28th day of April, A. D. 1899, and was thereafter and again, and on, to-wit, the 21st day of May, A. D. 1901, further authorized and empowered by the State of Colorado to carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty (20) years, by reason of the full and strict compliance with all the laws and statutes of the State of Colorado then existing, and by virtue of the authority and
33 certificate of authority issued to the respondent by the State of Colorado, by and through the Secretary of State, and under the great seal of the State of Colorado.

That at that time, to-wit, on the 17th day of May, A. D. 1901, the respondent had paid to the State of Colorado for the license, privilege and right to do, carry on and transact its business within the limits of the State of Colorado the full sum of fifteen thousand forty-two dollars and fifty cents ($15,042.50), and by virtue of filing its said certificates and the duly authenticated incorporation laws of the State of New Jersey, and the appointment of its authorized agent upon whom process might be served, and the payments aforesaid, and the laws and statutes of the State of Colorado aforesaid, the respondent acquired the right by contract with the State of Colorado, under the laws and statutes thereof, to do, carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty (20) years, and has been ever since the 28th day of April, A. D. 1899, and still is, entitled to the protection of Section 2 of Article II of the Constitution of the State of Colorado, and clause 1, Section 10, Article I of the Constitution of the United States against any attempt of the General Assembly of the State of Colorado, or any other authority, to declare a forfeiture of its said contract
34 right so to do, carry on and transact its lawful business within the limits of the State of Colorado; and that the said pre-

tended act, so approved as aforesaid on the 22nd day of March, A. D. 1902, in so far as it purports or attempts to work a forfeiture of the respondent's right so to do, carry on and transact its lawful business within the limits of the State of Colorado, impairs the obligation of said contract right and is null and void, in contravention of the Constitution of the State of Colorado and the Constitution of the United States.

That the said pretended Act, so approved as aforesaid on March 22, 1902, in so far as it purports or attempts by said Section 66 thereof to provide that the failure of the respondent to pay the tax, attempted to be provided for in said Sections 64 and 65 of said pretended Act, may be pleaded and maintained as an absolute defense or bar to any or all actions, suits or proceedings at law or in equity, brought or maintained on behalf of any corporation, including this respondent, failing to pay such tax in any court of competent jurisdiction within the limits of the State of Colorado until such tax is paid, is in violation and contravention of Section 6 of Article II of the Constitution of the State of Colorado, in that the provisions of said Section 66 attempt to deny to the respondent the constitutional right and guaranty that the courts of justice of the State of
35 Colorado shall be open to this respondent, and a speedy remedy afforded to the respondent, and the administration of right and justice without sale, denial or delay.

That the said pretended Act, so approved as aforesaid on March 22, 1902, in so far as it purports or attempts to provide, by Section 66 thereof, for a forfeiture of the right of this respondent, or any other corporation, to do, carry on or transact its lawful business within the limits of the State of Colorado, attempts to deprive persons, and this respondent, of property without due process of law, and is in violation of paragraph 1 of Article XIV of the amendments to the Constitution of the United States.

That the said pretended act, so approved as aforesaid on March 22, 1902, attempts to impair, and does impair, the obligation of contracts, and attempts to impair, and does impair the obligation of the said contract made and entered into by and between this respondent and the State of Colorado permitting this respondent to do, carry on and transact its lawful business within the State of Colorado, and is in violation of clause 1 of Section 10 of Article I of the Constitution of the United States.

That said pretended act, approved March 22, 1902, in so far as it purports to provide, by Section 66 thereof, for the forfeiture of the right of this respondent, or of any other corporation, to do,
36 carry on and transact its lawful business within the limits of the State of Colorado, upon failure to pay the said tax provided to be paid in Sections 64 and 65 of said pretended act, attempts to cover and embrace, and does cover and embrace, a subject not relating to public revenue, and a subject different from any other subject matter contained in said pretended act, and a subject matter not expressed in the title of said pretended act; and the provisions of said Section 66 of said pretended act are in violation of Section 21 of Article V of the Constitution of the State of Colorado.

That the said pretended act, approved March 22, 1902, and the provisions thereof, are in violation of paragraph 1 of Article XIV of the amendments to the Constitution of the United States, in that they deny to this respondent the equal protection of the laws in this, that corporations organized and existing under and by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or over are assessed and taxed thereby only two (2) cents upon each one thousand dollars ($1,000) of capital stock, while the respondent is assessed and taxed thereby the sum of four (4) cents upon each one thousand dollars ($1,000) of its capital stock. And this respondent is further denied the equal protection of the laws in that corporations organized under the laws of the
37 State of Colorado and having a capital stock of less than twenty-five thousand dollars ($25,000) are exempt from any assessment or tax upon their capital stock.

That previous to the passage of the said pretended act, approved March 22, 1902, a large number of corporations were formed under and by virtue of the laws of the State of Colorado which had a capital stock of less than twenty-five thousand dollars ($25,000), and that such corporations still exist and are doing business within the limits of the State of Colorado, and are exempt by the provisions of said pretended act from the payment of any tax whatever upon their capital stock.

That the said pretended act, approved March 22, 1902, is in violation of Section 3 of Article X of the Constitution of the State of Colorado in this, that the said tax attempted to be assessed and levied thereby upon the capital stock of corporations doing business within the State of Colorado is not uniform upon the same class of subjects, in that the capital stock of this respondent is divided into shares of one hundred dollars ($100) each, and this respondent is compelled and required by the said pretended act to pay a tax of four (4) cents upon each one thousand dollars ($1,000) of its capital stock; while corporations organized and existing under the laws of the State of Colorado, created and existing prior to the passage and approval of said pretended act, and having a capital stock of less
38 than twenty-five thousand dollars ($25,000), are exempt from any taxation whatever under the provisions of said pretended act upon their capital stock; while corporations organized and existing under and by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or more are required by said pretended act to pay only the sum of two (2) cents upon each one thousand dollars ($1,000) of their capital stock.

That the tax upon the capital stock of foreign corporations attempted to be assessed and levied by the said pretended act is not uniform, in that the tax attempted to be assessed and levied thereby upon the capital stock of this respondent is four cents on each one thousand dollars ($1,000) of capital stock, while upon the capital stock of foreign corporations whose shares of stock are less than one dollar ($1.00) per share the tax assessed and levied by said pretended act is at the rate of two and one-half (2½) cents per thousand shares.

That by reason of the exemption of corporations organized and ex-

isting under and by virtue of the laws of the State of Colorado having a capital stock of less than twenty-five thousand dollars ($25,000) from any tax whatever upon their capital stock, and the assessment of a tax of only two (2) cents upon each one thousand dollars
39 ($1,000) of the capital stock of corporations organized and existing under a- by virtue of the laws of the State of Colorado having a capital stock of twenty-five thousand dollars ($25,000) or more, and the assessment and levy of four (4) cents upon each one thousand dollars ($1,000) of the capital stock of this respondent, and the assessment and levy of a tax in a different amount upon the capital stock of foreign corporations whose shares of stock are less than one dollar ($1) per share, this respondent is denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, and is denied a uniformity of taxation as guaranteed by Section 3 of Article X of the Constitution of the State of Colorado.

This respondent further says that there are now, and there were previous to the attempted passage or approval of the said pretended Act, approved March 22, 1902, foreign corporations organized and existing under and by virtue of the laws of States in the United States other than the State of Colorado, whose shares of stock were and are less than one dollar per share and which were authorized to transact and carry on, and were transacting and carrying on, their business within the limits of the State of Colorado, and authorized so to do by the State of Colorado prior to the pretended passage or approval of said pretended Act by virtue of a full and complete compliance with all the laws of the State of Colorado then ex-
40 isting in relation to the doing of business within the limits thereof by foreign corporations, and by virtue of a full payment of all the fees required by the statutes and laws of the State of Colorado then existing to be paid for the right and privilege to transact their business within the limits of the State of Colorado, and many of such foreign corporations whose shares of stock were less than one dollar ($1.00) per share, so transacting and authorized to transact their business within the limits of the State of Colorado, still continue to transact their business within the limits of the State of Colorado.

Respondent further says that by reason of the payment of the said sums aggregating $15,042.50, and by reason of a full and strict compliance with all the laws and statutes of the State of Colorado then existing, this respondent acquired the right by contract with the State of Colorado to do, carry on and transact its lawful business within the limits of the said State of Colorado, and is entitled to the protection of clause 1 of Section 10 of Article I of the Constitution of the United States against any attempt to declare a forfeiture of its said right so to do, carry on and transact its lawful business within the limits of the State of Colorado, and to maintain, prosecute and defend any and all sorts of suits, actions, and proceedings in the State of Colorado and the courts thereof. And in so far as the said
41 pretended act, approved March 22, 1902, purports or attempts to work a forfeiture of this respondent's said contract right

so to do, carry on and transact its lawful business within the limits of the State of Colorado and to prosecute and defend any and all suits, both at law and in equity, in the courts of the State of Colorado, it impairs the obligation of this respondent's contract with the said State of Colorado and is unconstitutional, null and void.

This respondent further alleges that it uses its said capital of one hundred million dollars ($100,000,000) not only in the State of Colorado but in the States of New York, New Jersey, Pennsylvania, Illinois, Missouri, Nebraska, Utah, Idaho, Montana, and in the Territory of New Mexico, and in the Republic of Mexico, and that the greater part and portion of its said capital is so employed and used outside of the limits of the State of Colorado.

This respondent further says that of its said capital of one hundred million dollars ($100,000,000), more than one million dollars, ($1,000,000) has been invested in property and in improvements, and in the purchase of smelting plants and real estate, within the limits of the State of Colorado, all of which is used in connection with the transaction of its business within the limits of the said State of Colorado, and that the said sum of more than one
42 million dollars ($1,000,000), so invested as aforesaid, was permanently invested as aforesaid prior to the pretended passage or approval of the said pretended act, approved March 22, 1902, and that the said investments, so made as aforesaid by this respondent in the said State of Colorado, were made in reliance upon its said contract with the State of Colorado, which gave and granted to this respondent for the period of twenty (20) years the contract right to do, carry on and transact its lawful business within the State of Colorado, which contract right was given and granted to this respondent by the State of Colorado in consideration of the payments aforesaid made by this respondent to the State of Colorado, and in consideration of the full and strict compliance with all the laws and statutes of the State of Colorado in relation to the doing of business in said State by foreign corporations.

That by the provisions of said pretended Act, approved March 22, 1902, it is attempted to be declared and enacted, notwithstanding the existence of the contract aforesaid, that if this respondent, or any other foreign corporation, shall default in the payment of the said pretended tax, it shall not be permtited to do, carry on or transact its lawful business within the State of Colorado or defend actions in the courts of the State of Colorado; all of which is in contravention and violation of the terms of said contract.

43 This respondent further says that the said pretended tax of four (4) cents upon each one thousand dollars ($1,000) of capital stock of this respondent, attempted to be provided and required to be paid by this respondent under the terms of said pretended Act, is a tax upon the property of this respondent, and not only upon the property of this respondent situated within the State of Colorado, but also upon all its other property lying outside of the limits of the State of Colorado.

This respondent further answering, says that it was and is organized and existing as a corporation as aforesaid for the purpose,

among other things, of acquiring, dealing in, selling and otherwise disposing of ores, minerals and metals, and for the purpose of smelting, reducing, refining, milling and otherwise treating ores, minerals and metals, and for the purpose of manufacturing, acquiring, dealing in, selling and otherwise disposing of the products of ores, minerals and metals.

That the respondent, subsequent to the 28th day of April, 1899, pursuant to the authority of its certificate of incorporation and under and by virtue of its said contract with the State of Colorado, acquired by purchase within the State of Colorado, several smelting plants for the reduction, treatment and smelting of ores containing valuable metals, and ever since the year 1899 the respondent has been and still is the owner of said smelting plants as so purchased,
44 and has been and still is operating the same.

That this respondent, in carrying on and transacting its lawful business and in operating its said smelting plants within the limits of the State of Colorado, has at all times since the year 1899 purchased and is still purchasing continually large quantities of ores containing valuable metals in various the Territories and States of the United States other than the State of Colorado, and also in the Republic of Mexico, and at all of said times has been shipping and still continues to ship such ores so purchased to its said smelting plants within the State of Colorado for the purpose of treating and smelting the same at its said smelting plants located in the State of Colorado.

That the respondent, ever since the year 1899, has been and still is treating, reducing and smelting such ores so purchased outside of the State of Colorado and extracting the valuable metals therein contained at its said *sam*ilting plants in the State of Colorado, and has been at all of said times and still is shipping the valuable metals so extracted from the said ores so purchased outside of the State of Colorado as aforesaid to the eastern markets outside of the State of Colorado and in States of the United States other than the State of Colorado, and has been at all the times aforesaid and still is selling the metals so extracted from said ores so purchased outside of
45 the State of Colorado in the eastern markets outside of the State of Colorado and in States of the United States other than the State of Colorado.

And this respondent says that all of the said ores so purchased as aforesaid outside of the State of Colorado by this respondent are shipped to its said smelting plants within the State of Colorado for the sole and only purpose of extracting therefrom the valuable metals therein contained, and that the valuable metals therein contained when so extracted are forthwith shipped outside of the State of Colorado and sold in markets entirely outside of the State of Colorado.

This respondent, further answering, says that ever since the year 1899 citizens and residents of Territories and States of the United States other than the State of Colorado have been consigning and shipping and still are consigning and shipping large quantities of ores containing valuable metals to this respondent at its smelting

plants within the State of Colorado, for the sole and only purpose of having the metals contained in such ores extracted therefrom by this respondent at its said smelting plants in the said State of Colorado; that this respondent forthwith ascertains the value of such ores and purchases the same from the owners thereof, and pays for the same, and thereupon immediately extracts the valuable metals from such ores within the State of Colorado and ships such
46 metals forthwith out of the State of Colorado and sells the same upon the market in States of the United States other than the State of Colorado.

This respondent further says that by reason of the fact that it purchases ores outside of the State of Colorado and ships the same to its smelting plants in the State of Colorado, and at such smelting plants extracts the valuable metals contained in such ores, and ships such valuable metals so extracted from such ores to markets located outside of the State of Colorado and in States of the United States other than the State of Colorado and there sells the same, and by virtue of the fact that citizens and residents of the Territories of the United States and States of the United States other than the State of Colorado consign and ship their ores to this respondent within the State of Colorado for the purpose of having the valuable metals therein contained extracted by this respondent, and receive the value of such ores from this respondent, this respondent is engaged in interstate commerce and its business is that of commerce among the several States and the citizens thereof, and that the said tax of four cents upon each one thousand dollars of the capital stock of this respondent so attempted to be assessed and levied as aforesaid by the General Assembly of the State of Colorado is a tax upon interstate commerce and a tax upon property imported into the State of Colorado
47 from Territories and States of the United States outside of the State of Colorado for the mere temorpary purpose of [illegible]ting and preparing the valuable parts and portions of such property for sale in the markets of the world outside of the State of Colorado, and is an attempted discrimination and regulation adverse to the citizens and property of the Territories and States of the United States other than the State of Colorado, and is therefore an unauthorized interference on the part of the General Assembly of the State of Colorado with the power given to the Congress of the United States by the Constitution thereof, over all matters in relation to commerce with foreign nations and among the several States, and is unconstitutional and void.

This requirement further says that the said pretended tax so attempted to be assessed and levied upon the capital stock of this respondent was and is a tax upon the property of this respondent, and that the same is not uniform with the taxes levied upon other property within the limits of the State of Colorado, nor uniform with the tax levied upon the capital stock of corporations organized and existing under and by virtue of the laws of the State of Colorado, nor uniform with the tax levied upon the capital stock of foreign corporations doing business within the State of Colorado whose shares are
48 of the par value of less than one dollar ($1.00) per share * * * and is arbitrarily assessed without any regard to

the value of the shares of stock upon which the said tax is attempted so to be assessed.

This respondent further says that the tax so attempted to be assessed and levied upon the capital stock of this respondent is four thousand dollars ($4,000) per year, and this action is predicated upon the failure of this respondent to pay the sum of four thousand dollars ($4,000) to the Auditor of State of the State of Colorado on or before the first day of May, A. D. 1902, and the further sum of four thousand dollars ($4,000) on or before the first day of May, A. D. 1903.

This respondent further says that all of its property within the limits of the State of Colorado has been at all times and is now being assessed and taxed for the purposes of general taxation and the support of the government in accordance with and under the provisions of the Statutes of the State of Colorado relating to taxation, and that all of the taxes so assessed and levied have been fully paid as the same became due and payable, and that no taxes of any kind or character whatever at any time assessed or levied against this respondent or its property in the State of Colorado remained unpaid, save only the said pretended tax of four cents upon each one thousand dollars of the capital stock of this respondent so at-
49 tempted to be assessed and levied as aforesaid, and this respondent says that the assessment and levy of four cents upon each one thousand dollars of the capital stock of this respondent is an attempt to subject the property of this respondent to double taxation and is an attempt to take the property of this respondent without due process of law.

Wherefore, this respondent, having fully answered, prays to be hence dismissed with its costs.

WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

STATE OF COLORADO, *City and County of Denver, ss:*

Charles W. Waterman, of lawful age, being first duly sworn, on oath doth depose and say: That the respondent above named, American Smelting and Refining Company, is a corporation; that he is one of the attorneys for said respondent and authorized to make this verification; that he has read the foregoing Answer and knows the contents thereof, and that the same is true to the best of affiant's knowledge and belief.

CHARLES W. WATERMAN.

Subscribed and sworn to before me this 16th day of September, A. D. 1903.

50 My commission expires March 31, 1907.

J. AUGUSTIN GALLAHER,
[SEAL.] *Notary Public.*

(Endorsed:) No. 35293. District Court City and County of Denver. The People of the State of Colorado *ex rel* Henry A. Lindsley, District Attorney for the Second Judicial District, Plaintiff, *vs.*

American Smelting and Refining Company, a Corporation, Respondent. Answer to the Complaint and Information. Filed in District Court City and County of Denver September 16, 1903, Otis B. Spencer, Clerk. Wolcott, Vaile & Waterman, Counsellors at Law, Denver, Colorado.

And afterwards, and on, to-wit, the 13th day of September, 1903, came the plaintiff herein, by his attorney, and filed herein his Reply to the Answer.

STATE OF COLORADO, *City and County of Denver.*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation to HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

51 Comes now the plaintiff, by N. C. Miller, Attorney-General of the State of Colorado, and without waiving his right and purpose to demur to said answer because the same does not state facts sufficient to constitute an answer to plaintiff's complaint and information:

I.

For a first reply to the answer in the above entitled cause, alleges: It admits each and every allegation in said answer not specifically denied in this reply, except those allegations in said answer of conflict between the Act entitled, "An Act in Relation to Public Revenue, and Repealing all Previous Acts or Parts of Acts in Conflict Therewith," approved March 22, 1902, and the constitution of the State of Colorado or the constitution of the United States, which allegations, and each and every of them, plaintiff denies.

It admits that the respondent, American Smelting and Refining Company, is now, and ever since the 4th day of April, A. D. 1899, has been a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, authorized by its articles of incorporation to transact the business therein specified, not only within the limits of the said State of New Jersey, but also in the various other States of the United States, the Republic of
52 Mexico, and elsewhere.

It admits that on or about the 28th day of April, A. D. 1899, the respondent being a corporation as aforesaid, pursuant to the statutes of the State of Colorado, in such case made and provided, and in strict compliance with the laws and statutes of the said State of Colorado, then existing, relating to the doing of business within

the said State of Colorado, by foreign corporations, did file with and in the office of the Secretary of State of the State of Colorado a copy of its charter or certificate of incorporation, duly certified and authenticated by the Secretary of State of the said State of New Jersey, and also a copy of the general incorporation laws of the said State of New Jersey, under and by virtue of which the respondent was incorporated as aforesaid, duly certified and authenticated by the said Secretary of State of the said State of New Jersey, and paid as fees to the Secretary of State of the State of Colorado the full sum of Nine Thousand Seven Hundred and Ninety-two Dollars and Fifty Cents ($9,792.50), under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, entitled "An Act Concerning Corporations," approved April 13, 1897; but

plaintiff denies that the said fees were paid by respondent for the leave, permission and right to do business within the limits
53 of the said State of Colorado for the full period of twenty years from and after the 28th day of April, A. D. 1899; but, on the contrary, alleges that said fees were paid by the defendant and accepted by the State of Colorado, subject to the right, on the part of the State, to require defendant to comply with all laws subsequently passed by the General Assembly of said State after the payment of said fees.

This plaintiff admits that on the 28th day of April, A. D. 1899, the respondent did also file with and in the office of the said Secretary of State of the State of Colorado, a certificate signed by the President and Secretary, duly acknowledged, designating the City of Denver, then in the County of Arapahoe, in the State of Colorado, as the principal place of business of the respondent, within the said State of Colorado, and also designating and appointing one James B. Grant, then a resident of the said City of Denver, as the authorized agent of the respondent, upon whom process might be served; that the said certificate last aforesaid was signed, sealed and acknowledged by the President and Secretary of the respondent on, to-wit, the 25th day of April, A. D. 1899, and that for the filing of the said certificate, last aforesaid the respondent paid all fees required of the respondent by the statutes and laws of the State of Colorado for filing the same.

54 Plaintiff further admits that on the 28th day of April, A. D. 1899, the respondent also filed in the office of the Recorder of Deeds of the County of Arapahoe, in the State of Colorado, and the county within which the City of Denver was then located, a certificate, duly signed, sealed and acknowledged by the President and Secretary of the respondent, in and by which the said City of Denver was designated as the principal place where the business of the respondent should be carried on in the said State of Colorado, and in and by which the respondent duly appointed one James B. Grant, then a resident of the said City of Denver, as its authorized agent, upon whom process might be served, and that for the filing of the said certificate last aforesaid the respondent paid all the fees then required of the respondent by the statutes and laws of the State of Colorado, for filing the same.

Plaintiff further admits that upon said 28th day of April, A. D. 1899, respondent filed each and every paper certificate, statute and law then necessary or required by the laws and statutes of the State of Colorado, and paid all the fees then required by the existing statutes of the State of Colorado for theprivilege to transact its business within the said State of Colorado; but

55 plaintiff denies that said privilege was obtained free from the obligation to comply with any and all laws thereafter to be passed.

Plaintiff admits that on the 28th day of April, A. D. 1899, the authorized capital stock of respondent was the sum of Sixty-five Million Dollars ($65,000,000), divided into shares of the par value of One Hundred Dollars ($100) each.

It admits that thereafter and on, to-wit: the 8th day of April, A. D. 1901, the respondent filed with, and in the office of the Secretary of State of the State of New Jersey, in due compliance with the laws of the said State of New Jersey, a duly signed, sealed and acknowledged amendment to its certificate of incorporation, and by said amendment increased the amount of the capital stock of respondent from Sixty-five Million Dollars ($65,000,000) to One Hundred Million Dollars ($100,000,000), divided into shares of the par value of One Hundred Dollars ($100) each; and that the amount of the capital stock of respondent is is still fixed and remains at the sum of One Hundred Million Dollars ($100,000,000).

It admits that thereafter and on, to-wit: the 17h day of May, A. D. 1901, the respondent filed with and in the office of the Secretary of State of the State of Colorado, a copy of its amendment to its certificate of incorporation duly certified and authenticated

56 by the Secretary of State of the said State of Colorado, a copy of its amendment to its certificate of incorporation, duly certified and authenticated by the Secretary of State of the said State of New Jersey, and then and there paid to the Secretary of State of the State of Colorado, as fees, the full sum of Five Thousand Two Hundred and Fifty Dollars ($5,250), in full and strict compliance with each and every law and statute of the State of Colorado, then existing, relating to the doing of business in the State of Colorado by foreign corporations.

Plaintiff admits that on the 17th day of May, A. D. 1901, the respondent filed in the office of the Recorder of Deeds of the County of Arapahoe a copy of said amendment, duly certified and authenticated by the Secretary of State of the State of New Jersey, and paid to said Recorder the fees required by law for such filing.

Plaintiff further admits that on, to-wit, the 21st day of May, A. D. 1901, the Secretary of State of the State of Colorado did execute and deliver to the respondent a certificate of authority under his hand and under the great seal of the State of Colorado, reciting and certifying that the respondents had made full payment of all fees prescribed by law to be paid to the Secretary of State of the State

57 of Colorado, and due at the time of *of* the issuance of said certificate, and reciting that the respondent was authorized

to exercise any corporate powers provided for by law, and this plaintiff admits that at the time of furnishing said certificate the respondent had paid all fees then due the Secretary of State; but this plaintiff denies that respondent was then and there authorized and empowered by the said State of Colorado to transact and carry on its business within the State of Colorado for the full period of twenty years unconditioned upon its compliance with the laws subsequently passed by the General Assembly of the State of Colorado; but, on the contrary, it alleges that the respondent was then and there required to comply with all laws which might subsequently be passed by the General Assembly of said State.

This plaintiff admits that the certificate of authority alleged to have been executed by the Secretary of State in the said answer is correctly copied and set forth on page six of the answer.

Plaintiff further admits that David A. Mills was the duly elected, qualified and acting Secretary of State of the State of Colorado.

Plaintiff admits that the General Assembly of the State of Colorado, during the year 1902, passed an act, entitled "An Act
58 in relation to Public Revenue, and Repealing All Previous Acts or Parts of Acts in Conflict Therewith," and that the said Act last aforesaid was approved on the 22nd day of March, A. D. 1902, but

it denies that said Act is in whole or in part, invalid, void, or unconstitutional.

This plaintiff admits that said Act, approved March 22, 1902, contains the said sections 64, 65, 66, 67, 68 and 69, and that said sections are correctly copied and set forth on pages 8 and 9 of said answer.

This plaintiff further admits that the respondent, prior to the passage and approval of the said Act, approved March 22, 1902, containing the said sections, had complied with every requirement of the laws of the State of Colorado then existing in relation to the doing or transacting of business within the limits of the State of Colorado by foreign corporations, and had paid in full all fees and charges of every kind and character required to be paid by the then existing laws and statutes of the State of Colorado by foreign corporations for the privilege and right to do business within the limits of the State of Colorado, and had filed all the certificates, papers, laws and statutes required by any law of the State of Colorado then existing in that behalf with the proper officer in the State of Colorado; but
59 this plaintiff alleges that under the laws and Constitution of the State of Colorado, then in force, the respondent was required to comply with all future laws which might be passed by the General Assembly of said State in reference to foreign corporations, and especially with the statutes relating to revenue which might be passed thereafter, and with any law which might be passed subsequently, requiring it to pay an annual license tax for the privilege of doing business in the State of Colorado.

This plaintiff denies that by virtue of the full and complete compliance with all the laws and statutes of the State of Colorado relating to the doing of business by foreign corporations within the State of Colorado, the respondent became, and was, by the State of Colorado, fully authorized and empowered to transact and carry on its lawful business within the limits of the State of Colorado for the full period of twenty years from and after the 28th day of April, A. D. 1899; and plaintiff denies that respondent was thereafter and again and on, to-wit, the 21st day of May, A. D., 1901, further authorized and empowered by the State of Colorado to carry on and transact its lawful business within the limits of the State of Colorado for the full period of twenty years by reason of the full and strict compliance with all the laws and statutes of the State of Colorado then existing, and by virtue of the authority and certificate of authority issued to
60 the respondent by the said State of Colorado, and by and through its Secretary and under the great seal of the State of Colorado; but, on the contrary, this plaintiff alleges that any privilege and license to do business within the limits of the State of Colorado by said respondent, was at any and all times subject to the obligation of said corporation to comply with all the laws which might be thereafter passed by the General Assembly of said State, and with such statutes as might be enacted thereafter, imposing upon said corporation an annual license tax for the privilege of doing business in the said State.

This plaintiff admits that on, to-wit, the 17th day of May, A. D. 1901, the respondent had paid to the State of Colorado for the privilege of transacting busines within the State the full sum of Fifteen Thousand and Forty-two Dollars and Fifty Cents (15,042.50); but

it denies that, by virtue of the payment of said fee or sum, and filing of the certificates and incorporation laws of the State of New Jersey, and the appointment of its agent, under and by virtue of the laws of the State then existing, the respondents acquired the right by contract with the State of Colorado to carry on its business within the State of Colorado for the full period of twenty years.

And denies that the said sections 64, 65, 66, 67, 68 and 69, quoted in the answer from the said Act approved March 22, 1902,
61 impair the obligation of any contract right existing between the respondent and the State of Colorado, or that said sections, or any of them, impair the obligation of any contract, or that said sections, or any of them, are in contravention of the Constitution of the State of Colorado, or the Constitution of the United States, or in contravention of any provision of the Constitution of the State of Colorado, or of the Constitution of the United States.

This plaintiff admits that previous to the passage of said Revenue Act, approved March 22, 1902, a large number of corporations were formed under and by virtue of the laws of the State of Colorado, which had a capital stock of less than Twenty-five Thousand Dollars ($25,000), and that such corporations still exist and are doing business within the limits of the State of Colorado, and are exempt by

the provisions of the Act from the payment of any annual license tax computed upon their capital stock; but

denies that said exemption is in violation of any constitutional provision of the State of Colorado, or of the United States.

This plaintiff further replying, denies that the said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, or any of them, are in violation of any principle or provisions of the Constitution of the State of Colorado, requiring uniformity of taxes upon the same class of subjects, and denies that said tax is not uni-
62 form upon the same class of subjects, and denies that the said tax provided for in said sections is a tax upon the property; but, on the contrary, alleges that it is an annual license tax for the privilege of doing business within the State of Colorado, and acts uniformly and equally upon all subjects within the same class, and that the classification made by said sections for the purpose of revenue is not in violation of any principle or provision of the Constitution of the State of Colorado, or of the Constitution of the United States.

This plaintiff further admits that previous to the passage and approval of the said Revenue Act, approved March 22, 1902, there were foreign corporations doing business in the State of Colorado, whose shares of capital were, and are, less than one dollar per share, but this plaintiff alleges that the General Assembly of the State of Colorado had the right and constitutional power and authority to classify foreign and domestic corporations for the purpose of revenue, and impose an annual license tax upon them, and each of them, for the privilege of doing business within the State of Colorado; and that the classification made by said sections, or any of them, is not unjust, or unfair, nor is such classification made in violation of any principle or provision of the Constitution of the State of Colorado or of the United States; but, on the contrary, plaintiff alleges that
63 it operates justly and equally upon all subjects of the same class.

And this plaintiff denies that by reason of the payment of said sum, aggregating Fifteen Thousand and Forty-two Dollars and Fifty Cents ($15,042.50), and by reason of a full and strict compliance with all the laws and statutes of the State of Colorado then existing, the respondent acquired the right by contract with the State of Colorado to do, carry on and transact business within the said State of Colorado, except subject to the right of said State to require it to comply with all laws which might thereafter be passed by the General Assembly of said State, and especially with the said sections mentioned and complained of in the answer of the respondent.

And it denies that the forfeiture imposed upon the corporations by the said sections quoted from the said Revenue Act approved March 22, 1902, in the answer, impair the obligation of said respondent's alleged contract with the said State of Colorado, and denies that the said sections are unconstitutional by reason of working a forfeiture of its charter or right to do business in the State, unless it paid the said annual license tax assessed in said sections.

And this plaintiff admits that respondent uses its capital stock of One Hundred Million Dollars ($100,000,000), partially in the State of Colorado and partially in the State of New York, New
64 Jersey, Pennsylvania, Illinois, Nebraska, Utah, Idaho, Montana, and in the Territory of New Mexico and the Republic of Mexico, but

as to what portion of its capital stock is employed in the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Admits that the investment of money in the capital stock of said corporation was made prior to the passage of the Revenue Act, approved March 22, 1902; but,

denies it was made in reliance upon its said alleged contract with the State of Colorado whereby it claims the right to do business for the full period of twenty years in said State unconditionally, as to laws subsequently to be passed in said State; and this plaintiff denies that said corporation has any contract to do business in the State of Colorado which relieves it from its obligation to comply with any of the laws which the General Assembly of said State might pass subsequent to the payment to the Secretary of State of the State of Colorado of the fees mentioned in the answer; but alleges that said State expressly reserved the right to assess against or impose upon any and all corporations doing business in the State of Colorado, an annual license tax for the privilege of doing business in said State, and that said reservation was contained in the statutes and Constitution of the State of Colorado at the time the respondent
65 herein claims to have obtained the alleged contract to do business in the State of Colorado for the full period of twenty years.

This plaintiff denies that the said tax of four (4) cents upon each one thousand dollars of the capital stock of the respondent is a tax upon the property of the respondent, but on the contrary, alleges that it is only an annual license tax for the privilege of doing business in the State of Colorado.

And this plaintiff admits that said respondent was and is organized as a corporation for the purpose, among other things, of acquiring, dealing in, selling and otherwise disposing of ores, minerals and metals, and for the purpose of smelting, reducing, refining, milling and otherwise treating ores, minerals and metals; and for the purpose of manufacturing, acquiring, dealing in, selling, and otherwise disposing of the products of minerals and metals.

Plaintiff further admits that the respondent subsequently, and on, to-wit, the 28th day of April, A. D. 1899, acquired by purchase within the State of Colorado, several smelting plants for the reduction, treatment and smelting of ores containing valuable metals, and that it has been ever since, and now is, the owner of said smelting plants so purchased, and is still operating the same; but

66 it denies that the said investment was made upon its reliance upon the alleged contract with the State of Colorado;

That as to whether or not the respondent, in the operation of its smelting plants within the limits of the State of Colorado, has at all times since the year 1899 purchased or is still purchasing large quantities of ore containing valuable metals in the various States and Territories of the United States, other than the State of Colorado, or also in the Republic of Mexico; and as to whether or not at all of said times the respondent has been shipping or still continues to ship such ore so purchased to its said smelting plants within the State of Colorado, for the purpose of treating or smelting the same at its smelting plants in the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not since the year 1899 it has been and still is treating ores so purchased outside of the State of Colorado, or is extracting the value of the metals therein contained at its said smelting plants in the said State of Colorado, or has been at all times or still is shipping the valuable metals so extracted from the said ores so purchased outside of the State of Colorado, as aforesaid, to the eastern markets, outside of the State of Colorado, or in the States of the United States other than the State of Colorado; and as to whether or not respondent has been at all the times aforesaid,
67 or still is, selling the metals so extracted from said ores so purchased outside of the State of Colorado, in the eastern markets outside of the State of Colorado, or in the States of the United States other than the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not all said ores so purchased, as aforesaid, outside of the State of Colorado by said respondent are shipped to its said smelting plants within the State of Colorado for the sole and only purpose of extracting therefrom the valuable metals therein contained, or that the valuable metals therein contained, when so extracted, are, forthwith, shipped outside of the State of Colorado and sold in its eastern markets entirely outside of the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

That as to whether or not ever since the year 1899 citizens and residents of Territories and States of the United States, other than the State of Colorado, have been consigning, shipping and selling, or are consigning and shipping large quantities of ores containing valuable metals to said respondent at its smelting plants within the State of Colorado, for the sole and only purpose of having the metals contained in such ores extracted therefrom by said respond-
68 ent at its said smelting plants in the State of Colorado; and as to whether or not respondent forthwith ascertains the value of such ores, and purchases the same from the owners thereof, and pays for the same, and thereupon immediately extracts the valuable metals from such ores within the State of Colorado, and ships such metals, forthwith, outside of the State of Colorado, and sells the same upon the markets in the States of the United States, other than the State of Colorado, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Plaintiff admits that the citizens of the various States of the United States ship ores to the plants of the respondent in Colorado for treatment; but

as to whether or not the respondent goes into the Territories of the United States, or the States of the United States other than the State of Colorado, or into the Republic of Mexico, or into any Territory outside of the State of Colorado and buys ore for the purpose of shipping the same to its plants in Colorado for treatment, or for any purpose, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief; but avers that all ores shipped to the plants in Colorado by owners of such ores and received by the respondent at its plants in the State of Colorado, are subject to the laws of the State of Colorado, and the contract in relation to said ores is made under the laws of the State of Colorado; and denies that said respondent is engaged in any manner in interstate commerce.

69

And it denies that the tax of four cents upon each one thousand dollars of the capital stock of respondent imposed and required by sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, quoted in said answer, is a tax upon interstate commerce, or is a tax upon property shipped into the State of Colorado from Territories and States of the United States outside of the State of Colorado; and denies that said sections or any of them operate as a discrimination or regulation adverse to the citizens and property of the Territories and States of the United States other than the State of Colorado; and denies that said sections, or any of them, are an unauthorized interference, or any interference, on the part of the General Assembly of the State of Colorado with the power given to the Congress of the United States by the Constitution thereof over all matters in relation to commerce with foreign nations and among the several States;

And denies that said sections or any of them, are unconstitutional, or that they or any of them interfere with commerce between the States, or between the State of Colorado and any other State of the United States, or with foreign countries.

Plaintiff denies that the annual tax imposed by said sections, quoted in the answer upon the capital stock of respondent, is a tax upon the property of respondent.

70

Plaintiff denies that the said annual license tax is not uniform upon all subjects belonging to the same class made by said sections; and denies that the said annual license tax is a tax imposed upon the property of respondent;

This plaintiff admits that all the property of respondent within the State of Colorado is assessed and taxed for the purposes of general taxation and for the support of the government in accordance with, and under the provisions of the statutes of the State of Colorado relating to taxation, and that all of the taxes so assessed and levied have been fully paid as the same became due and payable; but

this plaintiff denies that the tax levied under and by virtue of sections 64, 65, 66, 67, 68 and 69, quoted in the answer and taken from the said Revenue Act, approved March 22, 1902, imposes a double tax upon property of respondent, and denies that said sections, or any of them, attempt to take the property of respondent, without due process of law, but, on the contrary, plaintiff alleges that said tax is an annual license tax, imposed upon and collected of each and every corporation doing business within the State of Colorado for such privilege, and that the forfeiture spoken of and complained of by respondent results only in case and so long as respondent
71 fails to pay such tax, and the right to do business within the State of Colorado revives immediately upon the payment of said tax after default.

And for a further and second reply to the answer of defendant or respondent, plaintiff demurs to said answer, and for grounds of demurrer alleges:

That the said answer does not contain facts sufficient to constitute any defense to the complaint and information filed herein.

And plaintiff, as its grounds of demurrer herein, more particularly alleges the following to-wit:

A. That the facts alleged in said answer are not sufficient to justify the conclusion that the respondent acquired the right to do business in the State of Colorado for the full period of twenty years by reason of compliance with any statutes, or by reason of anything done under and by virtue of the provisions of an Act of the General Assembly of the State of Colorado, "An Act Concerning Corporations," approved April 13, 1897, or under and by virtue of compliance with any other statute of the State of Colorado.

B. That the said answer does not set forth facts sufficient to show that sections 64, 65, 66, 67, 68 and 69 of the Act approved March 22, 1902, set out in said answer are unconstitutional and invalid.

C. That said answer fails to show compliance by said de-
72 fendant or respondent with said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, set out in said answer, therefore admits the failure to comply with all of the laws and statutes of the State of Colorado relating to the doing of business by foreign corporation- within said State; and, therefore, said answer is deficient and insufficient, and shows that it has not complied with all the statutes essential to the maintenance of its right to do business for the full period of twenty years, from and after the 20th day of April, A. D. 1899.

D. That said answer fails to set forth facts sufficient to show that the respondent is engaged in interstate commerce, or that said sections 64, 65, 66, 67, 68 and 69 of said Act, approved March 22, 1902, are an unlawful and unjust interference with commerce between States or the citizens of different States.

E. That said answer fails to set forth facts sufficient to constitute any defense to plaintiff's complaint and information.

Wherefore, plaintiff having fully replied to the answer of said de-

fendant, or respondent, prays for judgment and costs as prayed in the complaint filed herein.

HENRY A. LINDSLEY,
District Attorney for the Second Judicial District of the State of Colorado, and the Judicial District Constituted by the City and County of Denver.

73 N. C. MILLER,
Attorney-General.
HENRY J. HERSEY,
Of Counsel.

STATE OF COLORADO, *City and County of Denver, ss:*

N. C. Miller, being first duly sworn, deposes and says that he is the attorney of record in the above entitled cause and knows of the contents of said reply, and that the matters and things contained therein are true of his own personal knowledge, except what is alleged on information and belief, and as to those allegations he believes the reply to be true.

N. C. MILLER.

Subscribed and sworn to before me this 7th day of October, A. D. 1903.

H. J. CLARK,
Clerk of Supreme Court, Colorado,
[SEAL.] By J. B. COOKE, *Deputy.*

74 (Endorsed:) No. 35293. In the District Court. The People of the State of Colorado *ex rel. vs.* American Smelting and Refining Company, a Corporation. Reply to Answer. Henry A. Lindsley, Dist. Atty. N. C. Miller, Attorney General, Henry J. Hersey, Of Counsel. Filed in District Court City and County of Denver, Sep. 13, 1903, Otis B. Spencer, Clerk.

And afterwards, and on, to-wit, the 7th day of December, A. D. 1903, the same being one of the regular juridical days of the September term 1903 of said court the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* H. A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY.

At this day come the parties hereto by their attorneys respectively, and thereupon on motion of defendant, by consent.

It is ordered by the court that said defendant have leave to amend its answer herein by interlineation which is accordingly done.

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

75 At this day come the parties hereto by their attorneys respectively; and thereupon this cause coming on to be tried before the court without a jury, a jury herein being expressly waived by consent of both parties hereto, and the court having heard the evidence adduced and the arguments of counsel, and the court not being sufficiently advised in the premises, takes the matter under advisement for its further advisement.

And afterwards, and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit.

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,
vs.
THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

This cause having heretofore been tried before the court upon the merits, and by the court taken under advisement, and the court being now fully advised in the premises, finds the issues herein joined in favor of the plaintiff; and thereupon,

It is ordered by the court that the judgment ordered pre-
76 pared in accordance with such finding, be signed and recorded in the Judgment Book.

And thereupon, and on, to-wit, on the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in the Judgment Book of said court, to-wit:

THE PEOPLE OF THE STATE OF COLORADO, on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,
vs.
AMERICAN SMELTING AND REFINING COMPANY, a Corporation.

This matter having come on further to be heard this 18th day of January, A. D. 1904, before the Honorable District Court, Third division of the City and County of Denver, aforesaid, formerly a part of the County of Arapahoe, and plaintiff being present by N. C. Miller, Attorney General, and respondent American Smelting and Re-

cott, Vaile & Waterman, and the court being fully advised in the premises, after having taken said matter under advisement,
77 doth find all material allegations of the complaint or petition in favor of the plaintiff, and doth find specially,

First: That there is due from said respondent, and payable to the Auditor of State of the State of Colorado for the use of said State, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000) and that the same is now still due and unpaid.

Second. That on to-wit, the 29th day of May, A. D. 1902, the Auditor of State of the State of Colorado, within the time required by said Act, notified in writing the said respondent, that by failure to comply with the requirements of said Act, it had forfeited its right to do business within the State of Colorado and further advised said respondent how it could be relieved from said forfeiture, and that it is further found that respondent has not paid said tax, although notified as aforesaid.

Third. That the said tax, which respondent has failed, neglected and refused to pay, is for the year ending May 1st, A. D. 1902.

Fourth. That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law.

Fifth. It is further found that said corporation is organ-
78 ized under the laws of the State of New Jersey, and does business in the State of Colorado as a foreign corporation; but that it has complied with all the laws of the State of Colorado demanded of foreign corporations, except Sections 64 to 69, inclusive, of the Revenue Act of 1902, entitled, "An Act in relation to public revenue, and repealing all previous acts or parts of Acts in conflict therewith," approved March 22, 1902, but that it has failed, neglected and refused to comply with any or all of said last named sections.

Wherefore, it is considered by the court, that the respondent American Smelting and Refining Company, a corporation, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid, and it is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

It is further ordered, that plaintiff shall have and recover of the respondent, its costs in this behalf incurred, taxed at the sum of $— and hereof let execution issue.

S. L. CARPENTER, *Judge.*

And thereupon, and on, to-wit, the same day (the 18th day of January, 1904,), the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

79 THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

At this day comes the said defendant by its attorneys and prays an appeal to the Supreme Court of the State of Colorado, which is allowed upon condition that it file herein within ten days from this day its appeal bond in the penal sum of five hundred ($500) dollars, with sureties to be approved by the clerk of this court.

And time and until sixty days from this day is allowed said defendant within which to prepare and tender to the Judge of this Court its Bill of Exceptions by it reserved herein, which when signed and sealed by the said judge shall be filed herein as of this day.

And afterwards, and on, to-wit, the 21st day of January, A. D. 1904, came the respondent by its attorneys, and filed herein its Appeal Bond, to-wit:

Know all men by these presents, That we, American Smelting and Refining Company, a corporation organized and existing under the laws of the State of New Jersey and Dennis Sheedy and Franklin Guiterman, General Manager, of the City and County of Denver, and State of Colorado, are held and firmly bound unto The
80 People of the State of Colorado in the penal sum of five hundred (500.00) no/100 dollars, lawful money of the United States, to be paid to the above named obligee for the payment of which, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, this 21st day of January in the year of our Lord one thousand nine hundred and four (1904).

Whereas, the said The People of the State of Colorado did, on the 18th day of January, A. D. 1904, at a term of the District court then being holden within and for the City and County of Denver and State of Colorado, obtain judgment against the above bounden, American Smelting and Refining Company, for the costs of suit to be taxed, from which judgment the said American Smelting and Refining Company has prayed for, obtained and taken an appeal to the Supreme court of said State.

Now the condition of the above obligation is such, that if the said American Smelting and Refining Company shall duly prosecute the said appeal and shall pay and satisfy the judgment, costs, interest and damages, in case the judgment shall be affirmed by the Supreme court whether judgment shall be given by the Supreme court
81 or by the said District court, then this obligation to be null and void, otherwise to remain in full force and virtue.

AMERICAN SM. & REF. CO., [SEAL.]
FRANKLIN GUITERMAN, *Gen. Mgr.*
DENNIS SHEEDY. [SEAL.]

STATE OF COLORADO, *City and County of Denver, ss:*

Dennis Sheedy, being first duly sworn, upon his oath says that he is one of the sureties on the within bond, that he is a resident of the City and County of Denver, State of Colorado, and that he is worth, and seized and possessed in his own right, over and above all his just debts and liabilities, in property not exempt by law from levy and sale upon execution, of a clear, unincumbered estate of the value of one thousand (1,000) dollars within the jurisdiction of this State.

DENNIS SHEEDY.

Subscribed and sworn to before me this 21st day of January, A D. 189—.

My commission expires March 31st, 1907.

J. AUGUSTIN GALLAHER,
[SEAL.] *Notary Public.*

(Endorsed:) No. 35293. District Court of City and
82 County of Denver. The People of the State of Colorado *ex rel. vs.* American Smelting & Refining Company. Appeal bond. Approved and filed this 21st day of January, A. D. 1904. Otis B. Spencer, Clerk, by J. S. Brown, Deputy.

STATE OF COLORADO, *City and County of Denver, ss:*

I, Otis B. Spencer, clerk of the District court in and for the City and County of Denver, State aforesaid, do hereby certify the above and foregoing to be a true, complete and perfect transcript and copy of Complaint, Demurrer, Answer, Reply Appeal Bond and Orders of Court had and entered of record in a certain cause in said court lately depending, wherein The People of the State of Colorado *ex rel.*, etc., were plaintiff, and American Smelting & Refining Company was respondent, as the same now remain on file and of record in said court.

And I further certify the accompanying Deposition and Bill of Exceptions to be the Original Deposition and Bill of Exceptions filed in said cause.

Witness my hand and seal of said court at the Court House in Denver, County and State aforesaid, this 24th day of February, A. D. 1904.

[SEAL.] OTIS B. SPENCER, *Clerk.*

83 STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HARRY A. LINDSLEY, District Attorney, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Stipulation.

It is hereby stipulated and agreed, by and between the plaintiff and the respondent, by their respective counsel of record, that the attached deposition of Franklin Guiterman, taken on the 30th day of November, A. D. 1903, before Grace B. Lindsley, a notary public, and certified by her, as such notary public, on the first day of December, 1903, may be read in evidence upon the trial of the above entitled cause, with the same force and effect as though regularly taken in accordance with the statutes in such case made and provided; and, further, with the same force and effect as if given orally upon the witness stand upon the trial of said cause, by the said witness Franklin Guiterman.

Dated Denver, Colo., Dec. 1st, 1903.

N. C. MILLER, *Attorney for Plaintiff.*
WOLCOTT, VAILE AND WATERMAN,
Attorneys for Respondent.

84 STATE OF COLORADO, *County and City of Denver, ss:*

In the District Court.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Deposition of Franklin Guiterman on Behalf of Respondent.

Be it remembered, That on the 30th day of November, A. D. 1903, at the hour of eleven o'clock a. m., in pursuance of a stipulation hereto attached, the parties to the above entitled cause appeared before me, Grace P. Lindsley, a Notary Public in a- for the City and County of Denver, in the State aforesaid, at Room 419 Equitable

Building, in said City, the plaintiff in said cause being represented by Mr. N. C. Miller, Attorney General, and the respondent in said cause being represented by Mr. C. W. Waterman, its attorney. And on this day came also before me Franklin Guiterman, of lawful age, to testify and the truth to say as a witness on the part and behalf of the *the* respondent in the suit and matter in controversy
85 above mentioned and now pending and undetermined in said court. And the said witness having been by me first duly sworn according to law respectively to testify to the truth, the whole truth and nothing but the truth in the matter and suit in controversy aforesaid, was examined by oral interrogatories propounded to him by counsel, as in his deposition following appears:

FRANKLIN GUITERMAN, a witness produced on the part of the respondent, being first duly sworn, in answer to interrogatories propounded to him, testified as follows:

Direct examination by Mr. WATERMAN:

Q. You may state your full name.
A. Franklin Guiterman.
Q. Where do you reside?
A. Denver.
Q. Are you in any way connected with the respondent, the American Smelting and Refining Company?
A. I am employed by the respondent.
Q. In what capacity?
A. General manager of the Colorado department.
Q. Are you familiar with the business of the respondent company?
A. I am.
Q. The respondent company began doing business in this State in the year 1899, did it not?
A. Yes, sir.

Q. What is the business of the respondent company?
86 A. The business of smelting ores, and refining the metals obtained therefrom.

Q. How many plants has it in Colorado?
A. It now has seven in Colorado. That is the number left after having dismantled several.
Q. Does the respondent company purchase the ores which it smelts, or does it smelt them and reduce them for individuals for hire?
A. It purchases outright the ores which it smelts.
Q. From what source do the ores which the respondent company purchases and treats in its Colorado plants come?
A. Partly from Colorado, and partly from other States and Territories.
Q. Will you name some of the States and Territories that those ores come from?
A. Utah, Idaho, Montana, California, Arizona, New Mexico, South America and Old Mexico. I think I have named them all.

Q. How about British Columbia?
A. British Columbia; yes.
Q. How about the Dakotas?
A. The Dakotas; yes—that is, South Dakota.
Q. Does your company purchase ores in States, Territories and countries other than the State of Colorado which are to be delivered to the respondent company by the sellers at the respondent company's plants in the State of Colorado?
A. Yes, sir; it does.

87 Q. Are such ores so purchased and contracted to be delivered, as referred to in my question, purchased and received by the respondent company at its plants in Colorado?

A. In a large part, foreign ores are purchased in foreign Territories through local agencies, for which the cash is paid, and the transaction is completed there. The ores are then shipped to Colorado by such agencies, on bill of lading with draft attached.
Q. But you do also contract for ores in other States, Territories and countries outside of Colorado, whereby the contracts calls for the delivery of the ores so purchased at your plants in Colorado?
A. Yes, sir; to a considerable extent.
Q. What portion of the ores purchased by your company and treated at its plants in Colorado come from States, Territories and countries outside of Colorado?
A. Well, I should say, roughly speaking, about forty per cent., perhaps.
Q. State whether or not ores containing valuable metals are shipped to the respondent company from points outside of the State of Colorado consigned to the respondent company, which, upon being received by the company at its plants in Colorado, are sampled and the value ascertained and paid for on that basis?
A. Yes; there are such ores.
Q. From what sources do they come?
A. They come from the same States and Territories that I have named.

88 Q. Are there any other methods by which you purchase ores at points outside of the State of Colorado and receive them and smelt them in Colorado than those which you have testified to already?

A. There are not.
Q. The ores which your company purchases outside of the State of Colorado and receives at its plants in Colorado, as you have stated—what is done with them by the respondent company?
A. They are smelted and the metals are extracted and converted into the form of what is termed base bullion and blister copper, and those baser products are then sent east to our refineries for the separation of the respective metals from one another.
Q. Then what is done with them?
A. Then they are sold on the market by our company.
Q. In Colorado, or outside?
A. Outside of Colorado.
Q. Do you sell any of the metals so extracted by the Colorado plants, in Colorado?

A. We do not.

Q. How long has the respondent company been carrying on the business of purchasing ores outside of the State in the way you have testified, smelting them in this State, as you have testified, and shipping the bullion, as you have testified, to points outside of the State, and there refining the same and selling the same?

89 A. Since the organization of the company.

Q. In the year 1899?

A. Yes, sir.

Q. And is it still going on?

A. Yes, sir.

Q. Does the American Smelting and Refining Company own property outside of the State of Colorado in the nature of smelting plants?

A. It does.

Q. What other kinds of property does it own?

A. It owns mining property in addition to smelting property.

Q. Can you approximate the proportion of the entire property of the respondent company which lies inside the State of Colorado?

A. Of course, I could not answer as to the next details, but, roughly speaking, the proportion of the Colorado property to the whole property of the company would lie somewhere between 10 and 20 per cent. of the whole, I think.

Q. Not less than ten, nor more than twenty?

A. No, not more than twenty.

Q. Can you approximate, from your familiarity with the property of the company, and plants in this State, the value of such property in this State?

A. You mean the value of the smelting property in this State?

Q. The smelting property in this State.

A. Well, if we were to reconstruct the plants which we are operating, I should say that the value might be close to $5,000,000.

90 Q. Then I understand you to say, Mr. Guiterman, that the respondent company purchases ores in other States, Territories and countries than the State of Colorado, pays for them at the points of purchase, ships them to its smelting plants in the State of Colorado, and there smelts them?

A. Yes; it pays for them at the points of purchase in a very large measure. There are some exceptions to the rule, where the ores are shipped and sampled here and purchased on receipt. Where we have agencies, such as is the case in Idaho, such as is the case in Utah, such as is the case in South America, such as is the case in Mexico, the ores are paid for at the point of shipment and shipped to us.

Q. Then there are other ores coming from points outside the State of Colorado consigned to your company, which are purchased there, and consigned, and to be delivered, to your company in Colorado?

A. Yes, sir.

Q. And in other cases ores are consigned by the owners from points outside of the State of Colorado to the Smelting plants of the

company in Colorado, and when received are sampled and the value ascertained, and the value transmitted?

A. Yes, sir.

Cross-examination by Gen. MILLER:

Q. I understand, then, Mr. Guiterman, that there are just two methods by which you obtain ores outside of Colorado; one is by the local agency existing in some of those States and Territories, and foreign countries, determining the value of the ores in
91 those States, Territories and foreign countries, and it is paid for by shipping it to these plants in Colorado with bill of lading attached, and paid for upon arrival here, isn't it?

A. Yes, sir.

Q. Now, you have no means of transportation of that ore from those points to your smelters here?

A. It is foreign transportation, that is, by foreign companies.

Q. That is done by foreign corporations that you have no interest in or control over at all?

A. Exactly.

Q. And the shipment is from the foreign country wherever the mine is?

A. Yes, sir.

Q. To the plant in Colorado, and the bill of lading ends there?

A. It is either from the mine, General, or else from the sampling works in which the ore is sampled and then transmitted to the smelter, and value determined. If we settle there for it the value has to be determined by the same method of sampling that is used here; and draft is usually attached to the bill of lading.

Q. And the destination of it is either the Denver smelter, or some other smelting plant in Colorado?

A. Denver or Leadville, or Pueblo.

Q. After it is treated at the point in Colorado it is re-shipped under a different bill of lading, made out in the name of a different owner?

A. No—that is, you refer to the ore?

Q. No; after it is treated?

92 A. After the ore is treated the result, the product of that treatment, is base bullion or blister copper, which carries respectively gold, silver and lead, or copper, silver and gold; and those products are billed out by us to our refineries for further metallurgical treatment.

Q. The consignor of this base bullion is the American Smelting and Refining Company?

A. Oh, yes; at some other point.

Q. But the bill of lading from these foreign countries and States to a Colorado smelter is in the name of the owner of the ore to the American Smelting and Refining Company?

A. Yes; if the owner of the ore has shipped it and drawn on the bill of lading, it is shipped by him to us.

Q. It would necessarily be so if the bill of lading was attached, wouldn't it?

A. Yes, sir.

Q. It would be shipped in the name of the seller of the ore to the American Smelting and Refining Company?

A. Of the seller of the ore to the American Smelting and Refining Company.

Q. And as I understand, in all these cases the value is determined where the mine is—at least, in the country where the mine is?

A. Not always. It depends upon the arrangement. In the great majority of cases of foreign shipments the value is determined at the point of shipment. But in other cases it is determined here on arrival.

93 Q. Am I correct in the understanding that ores are shipped to the Colorado smelters from South America?

A. Yes, sir.

Q. British Columbia and Old Mexico?

A. Yes, sir.

Q. And several of the States which you have mentioned, and Territories?

A. Yes, sir; that is right.

Q. And I also understand you that from some of the States the owners of the ore ship direct to the smelters?

A. They do.

Q. And you determine the value as the smelters?

A. Yes, sir.

Q. And then pay for it there?

A. Pay for it here.

Q. Pay for it here at the smelter. In that case the value of the ore is determined at the smelters in Colorado?

A. Yes, sir.

Q. You have also mines in Colorado, besides smelters, havn't you?

A. No, sir; we have no mines in Colorado. We have mines in Mexico; but I am not aware——

Q. The mines which the Guggenheims bought in the San Juan country, were they not purchased in the name of the American Smelting and Refining Company?

A. Those mines are in the name of the Guggenheim Exploration Company; that has nothing to do with the American Smelting and Refining Company whatever.

Q. They own no such property in the State of Colorado?

94 A. Not to my knowledge.

Q. You have no interstate railroads which are connected with the carrying on of the American Smelting and Refining Company's business?

A. No, sir; no railroads.

Q. You depend entirely upon common carriers which are owned by other corporations than this respondent corporation?

A. We don't depend entirely upon them, no. We have a steamship line in the east which does business between our eastern refinery at Perth Amboy, New Jersey, and Mexico. We own our own steamship line.

Q. Carrying ores between Old Mexico and where?

A. And Perth Amboy, New Jersey.

Q. But none connected with Colorado?
A. Not at all, no.
Q. Is that steamship line owned by the American Smelting and Refining Company?
A. I so understand it.
Q. Or is it a separate corporation?
A. I understand it is owned by the company.

Redirect examination by Mr. WATERMAN:

Q. Referring to these ores which you say are purchased by the respondent company outside of the State of Colorado to be delivered by the seller in Colorado at the respondent company's plant, when they are received and the value ascertained, from the value so ascertained do you deduct the smelting charge and the
95 transportation charges?
A. Yes, indeed.
Q. And the balance, after such reduction, is remitted to the seller?
A. It is; yes, sir.
Q. Mr. Guiterman, since the respondent company began to do business in this State in the year 1899, down to the present time, how many tons of ore per month, on *on* average, during that time, have been treated and smelted by the respondent company at its smelting plants in the State of Colorado?
A. Approximately, 100,000 tons per month.

Recross-examination by Gen. MILLER:

Q. Your answer to the next to the last re-direct question of Mr. Waterman's relates to the ores that you buy at the mine in other States and countries?
A. It relates to all ores, General. The ores which we buy are subject to two payments to us; the deduction of the freight charge, and the deduction of the treatment charge. There is an exception to that sometimes; when we buy right on board the cars we always take off a certain amount for freight and treatment.
Q. If the owner, being a man in Idaho, ships you ore to the smelter in Colorado, you receiving it here and determining its value, and buying it in Colorado, do you pay the freight?
A. No, sir; we never pay the freight.
96 Q. But if you buy that ore yourself in Idaho?
A. I beg your pardon. I would like to modify that answer, if you please. Where we buy or contract for ore and pay the shipper so much money less freight and treatment charges, on board cars, then we pay the freight. Where we buy the ore delivered at the smelter we pay the freight also, and deduct it from him. In any event we pay the freight. We have our freight dealings with the railroads, and the shipper never pays the freight. We always pay the freight, deducting the freight tariff from the ore in settlement for the same. Do I make myself clear?
Q. Yes, I understand you.
By Mr. WATERMAN: But ultimately the shipper or owner or seller pays the freight?

A. The shipper or owner always pays the freight. We pay the freight in the sense that we simply advance the freight money on his behalf. That is what it amounts to.

By Gen. MILLER: Well, you have a general arrangement with the railroads, and you pay it and give the shipper the advantage of it?

A. No; we have to do that if the shipper doesn't prepay the freight; but we pay the freight for him, and the expense bill and everything else is shown to the shipper so that he sees what we pay to the railroad.

Q. You take it out and pay him the net amount?

97 A. We simply put ourselves in the position of advancing the freight money for him. He pays the freight always, practically. We don't pay it.

Q. It comes out of the value of the ore?

A. It comes out of the value of the ore. For instance, if the value of the ore, which happens sometimes, does not cover the freight and treatment charges, we transmit him a bill so that he has to make the difference good to us.

Q. You have agents that you employ, and you send them all over the country looking for ores for your smelters and buying them and having them consigned to your smelters here in Colorado, don't you?

A. No, I can't say that we do, General. We have local agents at points; but, for instance, in Idaho our agent is our Idaho client, and in Idaho we had a sampling works at one time.

Q. That is your agent there?

A. That would be our agent there. And here in Colorado we have a general purchasing agent who deals with the shippers, but in the sense of the term of having men going all around the country to buy ore, we haven't them.

Q. Not in the sense of traveling agents?

A. Not any traveling agents, no, sir.

Q. How is it with your local plants?

A. For instance, in Leadville we have a local man there.

Q. Well, that is in the State of Colorado; but when you buy ore in California you have a local plant there?

98 A. No. Either the party has to do his business through our local plant in each State or Territory or else he has to ship ore under the conditions which have been named by me. In California we have not any agent. In Idaho there are certain parties there that act as agents for us who are in mining camps, bankers there, through whom we transact business. They draw on us sometimes for money, advances and one thing and another, but we have not any traveling agents.

Q. But where you have not a local plant in the State outside of Colorado, they must necessarily ship it here to have its value determined?

A. They do; that is the practice as I have mentioned.

Q. But where you have a local plant, its value is determined in the State or Territory?

A. Not always. According to whether it is feasible or not. Sometimes it might cost them more, you see, to send it around to where we

could determine the value there, than if they shipped here direct. If they can avoid that cost and expense, shipping it direct, they do so. In this ore business we govern it entirely for the benefit of the shipper. We conduct our business so that the shipper gets the benefit of it.

Q. In any event when it is received and accepted by you at the plant, it becomes your ore?

A. Yes, sir; it is our ore.

Q. And treated by you as your ore after that time?

99 A. Yes, sir; it is our ore. We purchase it outright and the shipper pays the transportation cost and everything.

Q. But you have several plants in other States and Territories outside of Colorado?

A. Yes, sir; in fact the greater part, far the greater part, of our business is done outside.

FRANKLIN GUITERMAN.

STATE OF COLORADO, *City and County of Denver ss:*

I, Grace P. Lindsley, a Notary Public in and for the City, County and State aforesaid, do hereby certify that, on the day mentioned in the foregoing proceedings and deposition, I was attended by the counsel and witness aforesaid at room 419 Equitable Building, Denver, Colorado; that said witness, to-wit, Franklin Guiterman, was first duly sworn by me according to law as a witness in the suit or cause in the caption hereto mentioned, and there examined by counsel, and by the consent of the parties, by their several said attorneys, the examination of said witness was stenographically written down and afterwards typewritten; that such examination was had in the presence of the attorneys of the several parties hereto and that said deposition, after being completed and typewritten, was read over by the witness deposing the same and corrected, and was duly signed by said witness so making and signing the same, all in my

100 presence.

I further certify that the foregoing is a true statement of all the proceedings had before me in the matter of the taking of testimony herein.

I further certify that I am not related to or in any way connected with either of the parties to this suit.

I further certify that the fee for taking this deposition has been paid to me by Messrs. Wolcott, Vaile & Waterman, attorneys for respondent.

In witness whereof, I hereunto set my hand and notarial seal this 1st day of December, A. D. 1903.

[NOTARY SEAL.] GRACE P. LINDSLEY,
Notary Public.

My commission expires February 28, 1907.

STATE OF COLORADO, *City and County of Denver, ss:*

In the District Court of the Second Judicial District of the State of Colorado, sitting within and for the City and County of Denver.

No. 35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial
101 District of the State of Colorado, Plaintiff,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation, Respondent.

Defendant's Bill of Exceptions.

Appearances.

For the Plaintiff: N. C. Miller, Att'y Gen., and H. J. Hersey.
For the Defendant: Wolcott, Vaile & Waterman.

Be it remembered, that heretofore and on, to-wit: the day of 3rd of March, A. D. 1903, the respondent in the above entitled cause, filed therein in said District Court its demurrer to the complaint or information, which demurrer is of record in said cause; that thereafter, and, to-wit: on the 24th day of June, A. D. 1903, the said demurrer came on for argument before the court, and was argued by counsel for the respective parties, and was thereafter by the court overruled and denied, to which ruling of the court in overruling and denying the said demurrer, the respondent, then and there by its counsel duly excepted.

Thereafter, the respondent, American Smelting and Refining Company, filed in said cause its answer to the said com-
102 plaint or information, which is of record in said cause, and thereafter the plaintiff, the People of the State of Colorado, on the relation of Henry A. Lindsley, District attorney for the second Judicial District of the State of Colorado, filed a reply to the respondent's said answer, which reply is of record in said cause.

That thereafter, and on, to-wit, the 7th day of December, A. D. 1903, at the September Term of said District court, the said cause came on for trial before the Honorable Samuel L. Carpenter, judge of said court, without a jury, and the following proceedings were had, that is to say:

The plaintiff withdrew the demurrer contained in the said reply to the respondent's said answer, but without prejudice, however.

Thereupon, the plaintiff objected to the introduction of any testimony on the part of the respondent, on the ground that the respondent's answer did not state facts sufficient to constitute a defense to the complaint or information, which objection of the plaintiff was by the court overruled. Exception taken.

Thereupon, the respondent offered in evidence the certain deposi-

tion of Franklin Guiterman, taken on behalf of the respondent, which said deposition was and is of record and on file in said cause.

And thereupon, there being no objection to the said deposition the respondent read the said deposition of the said Franklin
103 Guiterman to the court, which said deposition of the said Franklin Guiterman so on file and of record, as aforesaid, is hereby made a part of the record and proceedings in said cause, and is on file and of record therein.

Thereupon, C. W. WATERMAN, a witness for the respondent, was called, and being first duly sworn, testified as follows:

As is shown by the pleadings in this case, the company was organized early in the year 1899. When it came to transact business in the State of Colorado, and to purchase property in the State of Colorado, the transaction of that business, so far as the legal aspect of it was concerned, fell to the hands of Mr. Joel F. Vaile and myself. I was probably in most of the transactions more closely connected than was Mr. Vaile. At that time we took the position and advised that no property should be purchased in this State until the respondent company had conformed with every law and statute in the State relating to the doing of business in the State by a foreign corporation. Certain things were done in that behalf either by Mr. Vaile or by myself, and all those matters appear in the pleadings and are admitted.

As soon as these things were done, the filing of the articles and the statutes of New Jersey and the certificates referred to in the pleadings on behalf of the respondent, we took up the examination of the titles to the several smelting plants of the State. There were two
104 in Denver, the Globe and the Grant; there were two at Pueblo, and there were three at Leadville, which were purchased immediately after the company had qualified itself to do business in this State, the title to the property being taken by the Smelting Company, the respondent, direct. In one or two other instances the company took the plants by purchasing the stock of the companies which owned them. None of these plants were purchased, nor was any property purchased by the Smelting Company until it had done the things in connection with its right to do business in this State, as shown by the pleadings. And counsel advised at that time that nothing of that kind should be done until the respondent had conformed to the laws of this State so that the respondent was enabled to do business in this State under its laws, and when it had conformed with those laws it could then safely proceed to buy property and to transact its business in this State.

Thereupon the plaintiff moved to strike out the testimony of C. W. Waterman, as being immaterial, incompetent and irrelevant, which motion was by the court then and there overruled. Exception taken.

Thereupon, the respondent, by its counsel, asked leave to amend its answer by inserting after the words on page 20 of said answer, to-wit: "Par value of less than one dollar ($1.00) per share,"
105 the following words, to-wit: "And is arbitrarily assessed without any regard to the value of the shares of stock upon which

There being no objection, it was ordered by the court that the respondent have leave to make the said amendment by interlineation, which was accordingly done.

And thereupon the cause was argued by counsel before the court, and the cause was by the court taken under advisement; and thereafter, and on, to-wit, the 18th day of January, 1904, the court made its findings in said cause in favor of the plaintiff and against the respondent, and did render and enter of record its judgment in said cause in favor of the plaintiff and against the respondent, which said findings and judgment were and are in the words and figures as follows, to-wit:

Be it remembered that heretofore and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term A. D. 1904 of said court, the following proceedings *inter alia* were had and entered of record in said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO *ex Rel.* HENRY A. LINDSLEY, ETC.,

vs.

THE AMERICAN SMELTING AND REFINING COMPANY, ETC.

106 This cause having heretofore been tried before the court upon the merits, and by the court taken under advisement and the court being now fully advised in the premises, finds the issues herein joined, in favor of the plaintiff, and thereupon,

It is ordered by the court, that the judgment ordered prepared in accordance with such finding be signed and recorded in the Judgment Book.

Be it remembered that heretofore and on, to-wit, the 18th day of January, A. D. 1904, the same being one of the regular juridical days of the January Term 1904 of said court, the following proceedings *inter alia* were had and entered of record in the Judgment Book of said court, to-wit:

35293.

THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,

vs.

AMERICAN SMELTING AND REFINING COMPANY, a Corporation.

This matter having come on further to be heard this 18th day of January, A. D. 1904, before the Honorable District Court, Third Division, of the City and County of Denver, aforesaid, for-
107 merly a part of the County of Arapahoe, and plaintiff being present by N. C. Miller, Attorney General, and respondent,

American Smelting and Refining Company, a corporation, being present by its attorneys, Wolcott, Vaile & Waterman, and the court being fully advised in the premises, after having taken said matter under advisement, doth find all material allegations of the complaint or petition in favor of the plaintiff, and doth find specially,

First. That there is due from said respondent, and payable to the Auditor of State of the State of Colorado, for the use of said State, on or before the first day of May, A. D. 1902, an annual State corporation license tax of four thousand dollars ($4,000) and that the same is now still due and unpaid.

Second. That on, to-wit, the 29th day of May, A. D. 1902, the Auditor of State of the State of Colorado, within the time required by said Act, notified in writing the said respondent, that by failure to comply with the requirements of said Act, it had forfeited its right to do business within the State of Colorado, and further advised said respondent how it could be relieved from said forfeiture, and that it is further found that respondent has not paid said tax, although notified as aforesaid.

Third. That the said tax, which respondent has failed, neglected and refused to pay, is for the year ending May 1st, A. D. 1902.

108 Fourth. That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law.

Fifth. It is further found that said corporation is organized under the laws of the State of New Jersey, and does business in the State of Colorado as a foreign corporation; but that it has complied with all the laws of the State of Colorado demanded of foreign corporations, except Sections 64 to 69, inclusive, of the Revenue Act of 1902, entitled "An Act in relation to public revenue, and repealing all previous Act or parts of Acts in conflict therewith" approved March 22, 1902, but that it has failed, neglected and refused to comply with any or all said last named sections.

Wherefore it is considered by the court, that the respondent, American Smelting and Refining Company, a corporation, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid, and it is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

It is further ordered, that the plaintiff shall have and recover of the respondent, its costs in this behalf incurred, taxed at the sum of $— and hereof let execution issue.

S. L. CARPENTER, *Judge.*

109 And foregoing contains all the evidence and testimony offered, given or received upon the trial of said cause.

To which findings, both general and special, and to each of them separately, so made by the court, the respondent then and there by its counsel duly excepted; and particularly to the first and fourth special findings.

To which judgment of the court the respondent then and there by its counsel duly excepted, and separately excepted to each of the three

To the entry of which said judgment of record, the respondent then and there by its counsel duly excepted.

And thereupon the respondent prayed an appeal from the said judgment to the Supreme Court of the State of Colorado, which was by the court allowed, upon condition that the respondent file in said cause its appeal bond for costs in the penal sum of five hundred dollars ($500.00) within ten (10) days from the said 14th day of January, A. D. 1904.

And thereupon on motion of the respondent, the respondent was allowed and given, by order of the court, sixty (60) days from and after the 14th day of January, A. D. 1904, within which to prepare and tender its bill of exceptions by it reserved upon the trial of said cause, which, when so authenticated, shall be and become a part of the record in said cause.

110 Thereafter and on, to-wit: the 21st day of January, A. D. 1904, the respondent filed in said cause its appeal bond for costs in the sum of five hundred dollars ($500.00), which said appeal bond was duly approved in compliance with the order of the court.

And for as much as the matters, proceedings and things hereinbefore set out do not fully appear in the record proper, the said defendant hath prepared and presented the foregoing bill of exceptions, and prays that the same may be allowed, signed, sealed and made a part of the record herein, which is accordingly done this 11th day of February, 1904.

SAMUEL L. CARPENTER, [SEAL.]
District Judge.

111 *Assignments of Error.*

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and humbly showeth to the Court that manifest manifold and grievous errors were committed to its prejudice by the court below in the proceedings, rulings and trial of this cause, and especially in the following particulars, to-wit:

1. The court below erred in overruling the demurrer to the complaint herein. (Fol. 24-38, 44, 231.)

2. The findings of the court below herein were erroneous and unsupported by the law or the evidence. (Fol. 187-90, 239, 241-3, 244.)

3. The court below erred in finding the issues herein joined in favor of the plaintiff. (Fol. 239.)

4. The court below erred in finding "all the material allegations of the complaint or petition in favor of the plaintiff." (Fol. 241.)

5. The court below erred in making the following special finding, to-wit: "First. That there is due from the respondent and payable to the Auditor of State of the State of Colorado, for the use of said State, on and before the first day of May, A. D. 1902, an annual

112 State corporation license tax of four thousand dollars ($4,000), and that the same is now still due and unpaid." (Fol. 241.)

6. The court below erred in making the "second" and "third" special findings, since the same and each of them are immaterial and

irrelevant, because predicated upon Sections 64 to 69 inclusive of the so-called "Act in relation to public revenues" approved March 22, 1902, and said so-called Act is without constitutionality, validity or operation in law. (Fol. 241-2.)

7. The court below erred in making the following special finding, to-wit: "Fourth: That said respondent still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado, without warrant of law." (Fol. 242.)

8. The "fifth" special finding of the court below is erroneous, in so far as it relates to or is in any manner predicated upon Sections 64 to 69 inclusive of a supposed "Act in relation to public revenues," approved March 22, 1902, since said so-called Act is void, invalid and wholly without operation or effect in law, because the power and method of taxation which said provisions attempt to authorize are in violation of the Colorado Constitution, and in excess of the amount of taxation as limited by said constitution, and also because the scope and powers of the legislature at the Special Session of 1902
113 were not such as to authorize or permit it to enact such statutory provisions. (Fol. 242-3.)

9. The court below erred in recognizing or giving any opreation to said Sections 64 to 69 inclusive, of the alleged act aforesaid, since said sections were not enacted under authortiy of law, and also since the subject matter of said provisions are contrary to, and in excess of the power conferred by the Colorado Constitution.

10. The judgment and decree of the court below is erroneous. (Fol. 190, 339, 343, 344.)

11. The court below erred in decreeing "that the respondent, American Smelting and Refining Company, has forfeited its right to do business within the limits of the State of Colorado, until such tax is paid." (Fol. 243.)

12. The court below erred in decreeing that said respondent "is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid." (Fol. 243.)

13. The court below erred in giving judgment against the appellant for costs, or in making and entering any judgment and decree herein against appellant. (Fol. 244.)

14. The court below erred in failing to find the issues joined herein in favor of the appellant, and in failing and refusing to enter
114 judgment in its favor as prayed for in its answer (Fol. 118.)

To all of which rulings, proceedings, findings and judgments, here complained of, the appellant reserved due, timely and separate exceptions.

Wherefore, the appellant respectfully prays that this judgment and decree may be reversed, and the cause remanded to the court below, with instructions from this court to dismiss herein, at the cost of the appellee (plaintiff below).

Respectfully submitted,

AMERICAN SMELTING & REFINING COMPANY,
By WOLCOTT, VAILE & WATERMAN,
Its Attorneys.

115 And afterwards and on to-wit the 5th day of May, A. D. 1904 the following Additional Assignment of Error, Motion for Leave to File same, and Notice, were filed in the Supreme Court, to-wit:

116 In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Additional Assignment of Error.

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and by leave of Court first had and obtained, makes the following assignment of error, in addition to those heretofore made in this cause, to-wit:

15. The findings and judgment of the court below herein were erroneous and unsupported by the law or the evidence, because said sections 64 to 69 inclusive of the alleged act of March 22, 1902, were and are unconstitutional, null and void, because in violation of the Federal Constitution.

AMERICAN SMELTING AND
REFINING COMPANY,
By WOLCOTT, VAILE & WATERMAN,
Its Attorneys.

(F:C:5:4:04:)

117 In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Motion for Leave to File Additional Assignment of Error.

Comes now the said appellant, by Messrs. Wolcott, Vaile and Waterman, its attorneys, and respectfully prays leave to file in this cause the additional assignment of error hereto attached.

And for ground of said motion said appellant respectfully shows to the Court that the assignments of error as originally drawn were intended to present the proposition formulated in the proposed additional assignment, and in the opinion of its said attorneys are

still sufficient for that purpose; nevertheless, since some question of the sufficiency of the original assignments in this respect has been suggested, and to remove all possible doubt or controversy, that said proposition is presented to this Honorable Court as the record shows it was presented to the court below, the foregoing additional
118 assignment of error has been prepared and leave to file it is now prayed.

Respectfully submitted,

WOLCOTT, VAILE & WATERMAN,
Attorneys for Appellant.

(F:C:5:4:04:)

In the Supreme Court of the State of Colorado.

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

Notice.

To Honorable N. C. Hiller, Attorney General for the State of Colorado:

DEAR SIR: You are hereby notified that on the incoming of the Supreme Court on Thursday, May 5th, 1904, at 10 o'clock, A. M., we will apply for leave to file an additional assignment of error in the above entitled cause, a copy of which assignment, together with motion for leave to file the same, is hereto attached: when
119 and where you are notified to attend in this behalf if you so desire.

Very respectfully,

WOLCOTT, VAILE & WATERMAN,
Attorneys for Appellant.

No objection to your inserting it.

N. C. MILLER.

Received a copy of the above mentioned assignment of error, motion and notice at the City of Denver, this 4th day of May, A. D. 1904.

N. C. MILLER,
Attorney General.

(F:C:5:4:04:)

(Endorsed:) No. 4798. Colorado Supreme Court. American Smelting and Refining Company *vs.* The People of the State of Colorado, *ex Rel.*, etc. Additional Assignment of Error, Motion for Leave to File same and Notice. Filed in Supreme Court May 5, 1904. Horace G. Clark, Clerk.

120 And afterwards and on to-wit the 3rd day of July, A. D. 1905, the following further proceedings were had and entered of record, to-wit:

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
vs.
THE PEOPLE OF THE STATE OF COLORADO *ex Rel.*, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

At this day this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said District Court in and for the County of Denver as also upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the Court, and it appearing to the Court that there is no error in the proceedings and judgment aforesaid of said District Court, it is therefore considered and adjudged by the Court that the judgment aforesaid of said District Court be, and the same is hereby affirmed, and stand in full force and effect; and that this cause be remanded to said District Court for such other and further proceedings, according to law, as shall be necessary to the final execution of the judgment of said District Court in the cause, notwithstanding the said appeal.

It is further considered and adjudged by the Court that said appellee do have and recover of and from said appellant their costs in this behalf expended, to be taxed, and that they have execution therefor. And let the opinion of the Court filed herein be recorded.

121 Which said opinion is in words and figures as follows, to-wit:

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,
v.
THE PEOPLE *ex Rel.* H. A. LINDSLEY, District Attorney, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

This is a direct proceeding in the nature of *quo warranto* against the respondent company, prosecuted by the people, at the instance of the district attorney and the attorney general of the state, and having for its object the forfeiture of respondent's corporate franchises for its failure to pay the annual state corporation license tax, which the briefs designate "a flat tax." The findings were against respondent, and the decree declared forfeited its franchises, and forbade it longer to do business within the limits of this state until the tax is paid. Respondent brings the case here by appeal.

Only questions of law are in issue, and these are as to the meaning and validity of certain sections of our general revenue act, as applied

The respondent, appellant here, is a corporation organized under the laws of the state of New Jersey for the purpose of carrying on a general ore reduction, milling, sampling, smelting and mining business, and, as originally formed, had a capital stock of sixty five million dollars divided into shares of the par value of one hun-
122 dred dollars each. Our laws permit foreign corporations to enter into, and do business in, this state upon compliance with certain statutory conditions. In pursuance thereof, the appellant filed in the office of the secretary of state in 1899 a duly certified copy of its articles of incorporation. The statute then in force was that of 1897 (Session Laws 1897, p. 157), and it required a certain fee to be paid to the secretary of state, for the use of the state, upon the filing of the certificate, and it was expressly provided that such corporation should not have or exercise any corporate powers, or be permitted to do any business, in this state until the prescribed fee was paid. Thereafter appellant's original articles of incorporation were amended by increasing its capital stock to one hundred million dollars, and in pursuance of the statute of 1901, then in force (Session Laws 1901, p. 116), an additional fee, which all corporations must pay when their capital stock is increased, was by the appellant tendered to, and received by, the secretary of state, and thereupon that officer, as the statute provides, issued to appellant his certificate to the effect that appellant had complied with the laws of Colorado, which authorized it to exercise its corporate powers within this state, and entitled to hold property and carry on its business and enjoy its rights and franchises here during the period of its corporate existence. The two fees paid amount to $15,042.50.

In 1902 the general assembly passed "An Act in relation to Public Revenue" (Session Laws 1902, p. 32), sections 64, 65 and 66 of which are material to this case.

Section 64 lays on domestic corporations having a capital stock of twenty five thousand dollars or over, an annual state cor-
123 poration license tax of "Two cents upon each one thousand dollars of its capital stock."

Section 65 reads: "Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

"SEC. 66. Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this state until

such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this state, until such tax is paid."

124 Appellant refused to pay the state license tax imposed by section 65, and this proceeding was brought to forfeit its franchises for such failure. As justification for the refusal, and as grounds for the reversal of the judgment declaring the tax valid, appellant asserts that the sections of the act cited are in violation of several provisions of the state and federal constitution, to the consideration of which we presently address ourselves.

Mr. Justice CAMPBELL delivered the opinion of the court:

1. It will materially lessen our labors and shorten the opinion first to determine the nature of the burden imposed. If we find that it is a business or excise tax, that conclusion will answer some of the most serious objections urged. If it is a direct tax on property, the attorney general is disposed to concede that it would be repugnant to several clauses of our own constitution.

The language of section 65 is that every foreign corporation shall pay annually "a state license tax as follows: Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares." The contention of appellant is that this is a direct tax upon capital stock, which is property, and, therefore, a property tax. The state says that, in the form of a license tax or excise, it is in reality a tax on the business of foreign corporations, and that the capital stock is merely taken as a convenient standard by which to estimate its amount.

125 "That the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business, and by the State which creates them, admits of no dispute at this day." *State Railroad Tax Cases*. 92 U. S. 575, 603; *Parsons v. The People*, 32 Colo. 221 (76 Pac. Rep. 666, 670).

In *Louisville Tobacco Warehouse Co. v. Commonwealth of Ky.*, 57 L. R. A. 33, is found an elaborate note which throws much light upon this section. It is not always easy to determine whether a tax like that here laid is a franchise, excise, or business, tax, or a property tax. It has been said that the usual and most certain test is whether the tax is upon the capital stock *eo nomine*, without regard to its value, or whether based upon its assessed value. If the former, it is not, if the latter, it is, a tax upon property. Otherwise expressed, if a tax is imposed directly by the legislature without assessment, and its amount determined by the number of shares of stock, or amount of business done, or dividends declared, or some such standard, it is not usually considered a property tax; but where there is a precedent valuation of corporate property, and the levy of the tax is made upon such basis, it is usually considered a property tax.

We are clearly of the opinion that, though in form this tax is upon the capital stock, it is not a property tax, though the privilege of doing business is a property right. It is arbitrarily assessed by the legislature itself without reference to the value of the stock, or property, of the company. The capital stock is simply the standard, or measure, by which the total amount to be paid is computed, and the tax is not on the stock as property. This we think is fully
126 sustained by the authorities. *People v. Home Ins. Co.*, 93 N. Y. 328, 344; *Lumberville &c. Bridge Co. v. State Bd. of Assessors*, 25 L. R. A. 134 and notes; *State v. Stonewall Ins. Co.*, 89 Ala. 335; *Society for Savings v. Coite*, 6 Wall. 594; *Southern Gum Co. v. Laylin*, 64 N. E. (Ohio) 564, and other cases cited in the note referred to. We hold that the tax authorized by section 65, called a license tax, is, in form of an excise, a tax on the business of foreign corporations, and is levied for the purposes of state revenue. This conclusion is fortified by other sections of the same act which specifically provide for the ascertainment of the value of corporate franchises and their taxation as corporate property upon that value, and still other provisions for the assessment and taxation of their tangible property.

2. The foregoing necessarily disposes of, as untenable, the objection that this section violates the uniformity clause of section 3 of article 10 of the constitution. That provision is applicable only to a direct *ad valorem* tax on property, and not to a tax upon privileges or occupations.

Denver City Ry. Co. *v.* City of Denver, 21 Colo. 350;
Parsons *v.* The People, *supra.*

3. The contention that section 65 is invalid because the thing imposed is in the nature of a license under the police power, and not a tax under the sovereign power of taxation, and therefore not within the title of the act, which is "An Act in relation to Public Revenue," cannot be upheld. That which is levied here is not for regulation, nor is it traceable to the police power of the state, but finds its sanction in the taxing power, and, while called a state license tax, it is, as already decided, a business tax, laid for the purpose of pro-
127 curing revenue for state purposes, and, therefore, the provision is clearly within the title.

4. Section 6 of article 2 of our state constitution provides that "courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that, right and justice should be administered without sale, denial or delay." And paragraph 1 of the 14th amendment of the federal constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. Appellant says that section 65 contravenes these safeguards because a forfeiture of corporate franchises, for failure to pay a tax, is beyond the power of the legislature to declare, and only the courts, upon due notice and hearing, can so decree, and such a remedy impairs the obligation of its charter contract. And particularly obnoxious to its charter and con-

tion of the section, which declares that a failure of the corporation to pay the tax imposed, "may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this state, until such tax is paid." As appellant is here called upon in court to justify its refusal to pay the tax, we fail to perceive the pertinency of the first objection. Besides, the forfeiture is merely a remedy for the due enforcement or collection of the tax, which may be lifted by its payment, and appellant is denied no constitutional right when that penalty, in a proceeding like this, is visited upon it for failing to make the payment.

128 Certainly appellant is not in a position to raise the last objection. It will be observed that failure to pay the tax is made a ground of defense to actions or suits brought or maintained by or on behalf of the defaulting corporation. This action is not brought or maintained by, or on behalf of, appellant, and no private litigant is interposing the defense. On the contrary, the proceeding is a direct one in the name, and by the authority, of the people of the state through its attorney general, and the corporation is brought in as a respondent and given full opportunity to be heard. It has been ruled that this is the proper practice. *Lumber Co. v. Ward,* 30 W. Va. 43. It is difficult to see how appellant may, in this proceeding, raise any such constitutional objection, for we repeat that not only has its right to be heard not been denied, but such right is expressly recognized by summoning it into court to speak. *McMillan v. Anderson,* 95 U. S. 40. If this were a case brought by, or maintained in behalf of, appellant against some defendant who sought to interpose the defense which the section authorizes, or if appellant were denied the right to defend in court, the case would be entirely different, and we might then be called upon to pass upon the point. That this remedy impairs the obligation of a charter contract, is based upon the proposition that no tax can be levied upon appellant's privilege to do business in this state, and this point receives consideration in connection with the next, and most important, general objection.

5. This is that section 65 violates section 11 of article 2 of the state constitution, and paragraph 1 of section 10 of article I of the federal constitution, in that it is an *ex post facto* law, retrospective in its operation, and impairs the obligation of a contract between

129 appellant and the state, and conflicts with other provisions of the state and federal constitutions. The argument is that, by the payment of the fee exacted by the state at the time the certified copy of articles of incorporation was filed, appellant thereby acquired, free from the burden of any additional tax or license fee of any kind whatsoever, the absolute right during the entire term of its corporate existence to do business as a corporation and to enjoy within the limits of this state all its rights and privileges and franchises granted to it by the state; that if this license tax is, as the state claims, an occupation or business tax, then its imposition is in violation of the terms of the contract included in its charter.

For several reason we are unable to agree with appellant. The fee paid to the secretary of state for the use of the state when the certificate is filed is not, in any sense, a tax. It is the conventional price or bonus, which the corporation pays to the state for the privilege of entering this state to do business as a corporation, subject to all legitimate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights, and upon the use of the privileges thus purchased. The right or privilege *to be* a corporation is a franchise itself, often called a primary franchise, and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the state of New Jersey, yet it was for the right to come into this state, and do business, as a corporation that the bonus was exacted. The secondary franchise or right of making use of the purchased privilege, which the books denominate the fran-
130 chise *to do*, is entirely distinct and separate from the franchise *to be*, or to exist here as a corporation. These distinctions are recognized by the highest authorities. In Central Pacific R. R. *v.* California, 162 U. S. 91, 127, the court says: "The right and privilege, or franchise, of being a corporation, is of value to its members and is considered as property separate and distinct from the property which the corporation may acquire." And we add, distinct from the franchise or privilege it secures to carry on the business which it was organized to transact. In *Lumberville &c. Bridge Co. v. State Board Assessors, supra,* the same doctrine is announced.

Moreover, unless the filing fee is a tax, and is to be considered as a substitute for, or the equivalent, or in lieu of, the entire tax which the general assembly intended to exact of foreign corporations for the privilege of doing business in this state, they cannot escape the license tax imposed by section 65, even though the filing fee statute expressly granted the exemption; for by section 9 of article 10 of our constitution the power to tax corporations and corporate property can never be relinquished or suspended.

But, as already observed, the particular claim here is that the filing fee, paid when appellant's certificate was filed with the secretary of state, was the payment of a tax in a lump sum for the privilege of exercising its corporate franchises and transacting its business in this state for the full term of its corporate existence, free from all further taxation; in other words, a business tax for the entire period. We have already held that this filing fee was the conventional price for appellant's right of entrance, as a corporation, and when paid merely entitles it to come into this state to do business as a
131 corporation, and gives it a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the secretary of state and pays the prescribed fee therefor. Neither the domestic nor the foreign corporation is thereby relieved of any subsequent legitimate tax for carrying on its business as a corporation.

But suppose it was such a tax as appellant says it is. Aside from the constitutional reason just given, it cannot, for another reason, be given the scope claimed for it. There is nothing in the language

of the filing statute which expressly, or by implication, exempts corporations from subsequent, or additional, taxation either upon their property or upon their right to transact business; and the universal rule in such cases is that exemptions are not favored, but must be clearly established or found in the contract or enactment under which they are claimed, either by express words, or by implication so strong as to lead irresistibly to the conclusion that exemption was intended. 10 Cyc. Law and Pro. 200 and notes. There is nothing in our act expressly conferring the exemption.

The appellant, conceding that to be so, insists that it is implied, for, it says, when the state granted the privilege of doing business in this state for a specified price, and did not expressly reserve the right to increase it, to add to the agreed consideration is beyond its power. In support of this contention the main reliance is upon *Gordon et al. v. Appeal Tax Court*, 3 How. 133, and other cases which have followed and approved it. That case has been so often criticised and disapproved by the Supreme Court of the
132 United States itself that it can no longer be considered as authority for the particular contention which appellant here makes. Two subsequent cases in the Supreme Court of the United States uphold the validity of a tax imposed by the statute there attacked, which is practically the same as that we are now considering. In *Memphis Gas Light Co. v. Shelby County*, 109 U. S. 398, a claim of exemption was made. The provision of the charter of the gas company on which its counsel mainly relied as showing a contract exempting it from taxation, gave to the company the privilege of erecting, establishing and constructing gas works, and manufacturing and vending gas in the city of Nashville for the term of fifty years, at prices therein prescribed. The particular point urged was that the subsequent statute of the state which assessed a license tax of $250 a year against the gas company was void because it violated the contract found in its charter, and the point pressed there, as here, was that to permit the state to tax the gas company by a license tax for the privilege granted by its charter is to destroy that privilege; but the court, speaking by Mr. Justice Miller, thus disposed of that argument:

"But the answer is that the company took their charter subject to the same right of taxation in the state that applies to all other privileges and to all other property. If they wished or intended to have an exemption of any kind from taxation, or felt that it was necessary to the profitable working of their business, they should have required a provision to that effect in their charter."

And quoting from *Erie R. R. Co. v. Penna.*, 21 Wall. 492, the court declared: "The language in which the surrender (of the right of taxation) is made must be clear and unmistakable." In
133 our statute, as in the Memphis Gas Company case, there is no express language which attempts to exempt appellant from taxation, nor is there even the remotest implication of such exemption. In *New Orleans City etc Co. v. New Orleans*, 143 U. S. 192, the same doctrine was announced, and *Gordon v. Appeal Tax Court*,

supra, commented upon and explained. See, also, *Erie Ry. Co. v. Commonwealth,* 66 Pa. St. 84.

In U. P. Ry. Co. *v.* De Busk, 12 Colo. 294, 307, our own court, in referring to the claim there made that a state statute impaired the obligation of the contract which was included in a corporate charter, quotes approvingly the well considered case of *Rodemacher v. Ry. Co.,* 41 Ia. 297, in which it was declared that: "There is no implied contract between a state and a corporation that there shall be no change in the laws existing at the time of the incorporation which shall render the use of a franchise more burdensome or less lucrative." The corporation takes "its charter subject to the general laws, and of course subject to such changes as shall be rightfully made in such laws." This applies to tax laws, as well as to others. That the right of exemption must be clearly shown, in cases like the one in hand, has often been decided.

Wells *v.* Savannah, 181 U. S. 531;
Delaware Railway Tax, 18 Wall. 206;
2 Cook on Corporations (5th ed.) §572b;
Atty. General *v.* Bay State Mg. Co. 99 Mass. 148, 152;
4 Thompson on Corporations, §§ 5571, 5572;
Judson on Taxation, §41;
Adams Express Co. *v.* Ohio State Auditor, 166 U. S. 185;
Lumber Co. *v.* Ward, 30 W. Va. 43, 48;
Standard &c. Cable Co. *v.* Atty. General, 46 N. J. E. 270.

134 Our conclusion is that the payment of the filing fee was not intended as a tax in a lump sum for the privilege granted to a corporation of exercising its charter powers, but merely the purchase price or bonus for the privilege of existing here as a corporation. But if it should be considered as a tax for the privilege of doing business in the state, this would not, in the absence of a clear exemption from further or additional burden,—which was not granted it—prevent the legislature from imposing an additional tax upon its business. No provision of the state or federal constitution would be violated by such subsequent levy of an occupation tax.

In *Kiowa County v. Dunn,* 21 Colo. 185, it was said that the property or business of a non-resident cannot be taxed in a different manner, or at a different rate, than that of a resident. A business or occupation tax was not involved in that case. But it is clear that in a license or business tax upon corporations the state may discriminate against a foreign, and in favor of a domestic, corporation, though it may not between a resident, and non-resident, natural person. This is declared in the leading case of *Paul v. Virginia,* 8 Wall. 168, 181, and the cases following that authority. In Pembina Mg. Co. *v.* Penna. 125 U. S. 181, 188, the Supreme Court of the United States, in considering the claim that in imposing license or franchise taxes the foreign corporations must be treated the same as domestic ones, said: "The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, was clearly established," sub-

ject only to such limitations as may be found in the fundamental law of the Union.

Copper Co. *v.* Scherr, 50 W. Va. 533;
13 Am. & Eng. Enc. Law (2d ed.), 844 *et seq.* 860.

135 Nor is the objection that foreign corporations, the par value of whose shares of stock is less than one dollar per share, are required to pay less tax than those whose shares of stock are of a greater value, good; for it is within the power of the general assembly, in imposing taxes of this kind, to make reasonable classifications for the purposes of taxation. In what particular, if at all, the classifications of this section are unreasonable, we are not advised.

6. Appellant is engaged in the business of mining, smelting, and refining ores and marketing the refined product, and the ores which it smelts in Colorado it obtains not only in this state but from other states of the Union, and from British Columbia and the Republic of Mexico, and of the aggregate business which it transacts, about twenty per cent. is done, and about twenty per cent. of its aggregate capital is employed, and a like amount of its property is situate, within this state. The bullion from the ores which it brings into, and from the ores which it both mines and treats in, this state, are sent to another state for refining, and from the refinery sent elsewhere to be sold or coined into money. For these reasons appellant contends that it is engaged in foreign and inter-state commerce, hence the tax here levied is laid upon that commerce, and, therefore, cannot be sustained.

We do not perceive the force of the argument. The tax is not levied upon any article that is imported into, or exported from, this state, nor is any instrument of inter-state or foreign commerce taxed, nor is any burden placed upon that commerce in the sense in which that term is used in the federal constitution. If there is any burden at all, it is only incidental, and such as results from all legitimate taxation.

136 Waters Pierce Oil Co. *v.* Texas, 177 U. S. 28;
Judson on Taxation, §158;
Ashby *v.* Ryan, 153 U. S. 436;
Postal Tel. Co. *v.* Charlestown, 135 U. S. 692.

The fact that only a portion of its capital is employed, and only a relatively small part of its property situate, in Colorado, does not relieve it from the payment of a tax of this nature. This has been expressly ruled in *Horn Silver Mg. Co. v. New York,* 143 U. S. 305. The particular objection that it is unfair and unjust and oppressive to the corporation not to take into consideration the fact that the larger portion of its capital and its property are situate without this state, was referred to in that case, and it was there said that such an argument should be addressed to the legislature, but it was not a matter with which the courts could interfere.

7. The late case of *People of the State of N. Y. ex Rel. The Met. Street Ry. Co., v. State Board of Tax Commrs.,* decided by the Supreme Court of the United States after oral argument of the case at

bar, and not yet officially reported, answers all the substantial objections which the appellant has made against the validity of this tax. The court there held that the principal objection to the tax made in that case, which was the same as that here, viz., that when the state grants a privilege on condition of the payment of a lump, or of an annual, sum the contract implies that the public shall exact no larger amount for that privilege, and that thereafter to impose a tax upon it is simply increasing the price which the grantee is called upon to pay for the privilege,—finds no justification in principle or authority.

See, also, the same case reported in 174 N. Y. 417, 446.

137 We are satisfied that this corporation license tax is on the business of foreign corporations which are established, and doing business, in this state, and, as such, is not subject to any of the constitutional objections interposed by appellant. The judgment below which sustained tax should, therefore, be affirmed, and it is so ordered.

Affirmed.

Decision by the court *en banc*.

138 And afterwards and on to-wit, July 12, A. D. 1905, there was filed in our said Court, a petition for a rehearing, which is in words and figures as follows, to-wit:

Petition for a Rehearing.

Comes now the said appellant, by Wolcott, Vaile & Waterman, its attorneys, and respectfully prays the Court that a rehearing be granted in this cause, and that upon such rehearing the present opinion herein, affirming the judgment of the court below, be withdrawn, a reargument of the cause allowed, and a decision rendered reversing said judgment and decree.

139 And further and on to-wit, October 2, A. D. 1905, the following proceedings were had and entered of record, to-wit:

No. 4798.

AMERICAN SMELTING AND REFINING COMPANY, Appellant,

v.

THE PEOPLE *ex Rel.* H. A. LINDSLEY, District Attorney, etc., Appellee.

Appeal from the District Court of the City and County of Denver.

This cause now coming on to be heard upon the petition of appellant for a rehearing herein and upon consideration thereof and the Court being now fully advised in the premises; It is Ordered and Adjudged by the Court that the said petition be and the same is hereby denied.

140 And afterwards, and on October 10, 1905, there was filed in our said court the following original Petition for a Writ of Error, Assignments of Error, Writ of Error, and Citation with the Proof of Service thereof, as also Supersedeas Bond, all of which are in words and figures as follows, to-wit:

141 In the Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO, on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Now comes American Smelting and Refining Company, a Corporation organized and existing under and by virtue of the laws of the State of New Jersey, Plaintiff in Error, and prays that a Writ of Error in the above entitled cause may issue to said the Supreme Court of the State of Colorado, to review that certain final judgment entered in the said Supreme Court of the State of Colorado on the 3rd day of July, A. D. 1905, in favor of the said The People of the State of Colorado On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error, and against the said American Smelting and Refining Company, Plaintiff in Error, affirming that certain judgment entered in the District Court sitting within and for the City and County of Denver, in the State of Colorado, in favor of said Defendant in Error, for the reason that manifest error hath intervened in the rendition of said judgment in the said Supreme Court of the State of Colorado, to the great damage and injury of the said American Smelting and Refining Company, Plaintiff in Error. That the said errors of the said Supreme Court of the State of Colorado herein complained of are particularly assigned and set forth in
142 the Assignment of Errors herewith tendered and filed.

Wherefore, The said American Smelting and Refining Company, Plaintiff in Error aforesaid, prays for the allowance of a Writ of Error to operate as a Supersedeas, and such other process as may cause the said judgment rendered as aforesaid by the said The Supreme Court of the State of Colorado to be reviewed and corrected by the Honorable The Supreme Court of the United States.

AMERICAN SMELTING AND REFINING COMPANY,
By JOEL F. VAILE,
CHARLES W. WATERMAN,
Its Attorneys.

THOMAS THACHER,
Of Counsel.

(W:S:10:9:05:)

143 The Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Assignments of Error.

Comes now the said plaintiff in error and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Colorado in the above entitled cause there is manifest error in this, to-wit:

1. The court erred in holding that the provisions of that certain Act of the General Assembly of the State of Colorado, entitled "An Act in relation to Public Revenue, and repealing all previous Acts or parts of Acts in conflict therewith," and especially Sec. 64, Sec. 65 and Sec. 66 of said Act approved March 22, 1902, are not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, in that the State of Colorado by and through the provisions of said Act and of the said Sections thereof assumes and seeks (1) to deprive the plaintiff in error and certain other citizens of the United States and of the State of Colorado, or some other one of these United States, of rights, privileges and immunities secured to other citizens of the United States and of said State of Colorado; (2) to deprive the plaintiff in error and other citizens of the United States similarly situated of liberty and property without due process of law; and (3) to deprive and deny to the plaintiff in error and certain other citizens and persons corporate within the jurisdiction of the State of Colorado, the equal protection of the laws.

144 2. The court erred in holding that by the provisions of said Act the plaintiff in error is not deprived of rights, privileges and immunities secured to other citizens of the United States and of the State of Colorado by the federal constitution and the laws of the United States.

3. The court erred in holding that the provisions of said Act are not in conflict with and in violation of the provisions of the Fifth Amendment to the Constitution of the United States, in that by the provisions of said Act, and especially by Sections 65 and 66 thereof, the State of Colorado assumes and seeks to deprive the plaintiff in error and other citizens of the United States of liberty and property without due process of law.

4. The court erred in holding that the provisions of said Act and of the Sections thereof, above specified, are not in violation of Section X of Article I of the Constitution of the United States, in that by and through said provisions of the Act aforesaid, the State of Colorado assumes and seeks to impair the obligation of the contract between the plaintiff in error and the State of Colorado, and to

5. The court erred in holding that by the said provisions of the Act aforesaid, the plaintiff in error was not deprived of liberty or property without due process of law.

6. The court erred in holding that the said provisions of the Act aforesaid do not deny to the plaintiff in error the equal protection of the laws.

7. The court erred in holding that the said provisions of the Act aforesaid do not impair the obligation of contracts nor deprive the plaintiff of pre-existing contractual rights.

8. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations and domestic corporations doing business in the State of Colorado.

145 9. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations and domestic corporations having a capital stock of less than $25,000.00.

10. The court erred in holding that the said provisions of the Act aforesaid do not unlawfully discriminate between foreign corporations, the par value of whose stock is $1.00 or more per share, and those, the par value of whose stock is less than $1.00 per share.

11. The court below erred in holding that the said provisions of said Act do not grant special and exclusive privileges to individuals and non-incorporated associations which it denies to the plaintiff in error and other corporate citizens and persons engaged in the same business, and owning or using the same class of property.

12. The court erred in holding that the provisions of said Act are uniform in their operation throughout the State upon all citizens of the State, or persons lawfully doing business therein similarly situated.

13. The court erred in holding that the provisions of said Act are not in violation of Section VIII of Article I of the Constitution of the United States, conferring upon Congress exclusive power to regulate commerce among the several States.

14. The court erred in approving the findings of the District Court within and for the City and County of Denver, State of Colorado against the plaintiff in error, and in affirming the decree of the said District Court, declaring that plaintiff in error had forfeited its franchises and forbidding it longer to do business within the State of Colorado.

15. The court erred in holding that the tax purporting to be imposed by the said provisions of the Act aforesaid was not a property tax.

146 16. The court erred in holding that said imposition was not a tax upon the capital stock of plaintiff in error, nor upon said capital stock as property.

17. The court erred in holding that the tax authorized by Section 65 of said Act is a mere license or excise tax.

18. The court erred in holding that said imposition is a tax on the business of foreign corporations.

19. The court erred in holding that the tax sought to be imposed

by the said provisions of the Act aforesaid is not an *ad valorem* tax on property, but is a privilege or occupation tax and therefore not violative of the laws requiring uniformity of taxation.

20. The court erred in holding that said Act denies no constitutional right of the plaintiff in error, because the plaintiff in error might escape the penalty imposed by said Act by submitting to such tax without questioning its validity.

21. The court erred in holding that the plaintiff in error is not in a position to raise the objection that said provisions of the Act aforesaid deprive plaintiff in error of its constitutional right to due process of law and the equal protection of the laws.

22. The court erred in holding that plaintiff in error is herein seeking any exemption from legitimate taxation, or that the said provisions of the Act aforesaid are a legitimate exercise of the power of taxation.

23. The court erred in holding that the plaintiff in error is herein or at all claiming that its payment of the tax imposed in a lump sum for the privilege of exercising its corporate franchises and transacting business in the State of Colorado for the full term of its existence entitled it to freedom from all further taxation.

24. The court erred in holding that the original tax paid by the plaintiff in error for the right to do business in the State of Colorado did not authorize the plaintiff in error to carry on its business in said State.

147 25. The court erred in holding that the Supreme Court of the United States has ever upheld the validity of a tax imposed by a statute or statutes practically or at all the same as that involved in this case.

26. The court erred in holding that the revenue imposition provided for in said provisions of the Act aforesaid is an occupation tax, and therefore not violative of any provision of the state or of the federal constitution.

27. The court erred in holding that the State of Colorado in the matter of taxation, such as that sought to be imposed by said provisions of the Act aforesaid, is entitled to discriminate between domestic and foreign corporations.

28. The court erred in holding that the State of Colorado in the matter of taxation aforesaid has the right to discriminate between foreign corporations, the par value of whose stock is less than $1.00 per share, and those, the par value of whose stock is $1.00 or more per share.

29. The court erred in holding that the State of Colorado is entitled to impose a tax, such as is sought to be imposed by the Act aforesaid, upon the entire capital stock of the plaintiff in error, notwithstanding the fact that not more than twenty per cent. of its aggregate capital is employed in the State of Colorado, or more than a like amount of its property situated therein.

30. The court erred in holding that the tax upon the entire capital stock of the plaintiff in error is lawful and legitimate because incidental to the employment of the twenty per cent. of said capital

stock and a like amount of the property and business of plaintiff in error within the State.

31. The court erred in holding that the fact that only a small part, relatively, of the property and business of plaintiff in error is situated in Colorado, does not relieve it from the payment of a tax of this nature upon the whole amount of its capital stock.

148 32. The court erred in holding that when the State grants a privilege, on condition of the payment of a lump or of an annual sum, the contract does not imply that the public shall not thereafter exact a larger amount for that privilege, but is authorized thereafter to impose a tax upon it which is simply increasing the price which the plaintiff in error is called upon to pay for the right to do business in the State of Colorado.

33. The court erred in holding that the imposition provided for in said Act and the sections thereof aforesaid, is a license tax on the business of foreign corporations.

34. The court erred in approving and confirming the finding and judgment of the District Court within and for the City and County of Denver, State of Colorado, that there is now due from the plaintiff in error and payable to the Auditor of the State of Colorado an annual State corporation license tax of $4,000.00, or any other sum, on or before the 1st day of May, 1902, or any other time, and that the same is still due.

35. The court erred in approving and confirming the finding of the said District Court, that the plaintiff in error still continues to exercise the powers, privileges and franchises of a corporation within the limits of the State of Colorado without warrant of law.

36. The court erred in affirming the decree of the said District Court, adjudging and decreeing that the plaintiff in error has forfeited its right to do business within the State of Colorado until such tax is paid.

37. The court erred in affirming the decree of the said District Court adjudging that the plaintiff in error be and is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid.

38. The court erred in holding and adjudging that the said provisions of the Act aforesaid are constitutional and valid.

149 39. The court erred in failing and refusing to reverse the decree of the said District Court herein.

JOEL F. VAILE,
CHARLES W. WATERMAN,
Solicitors for the said Plaintiff in Error.

THOMAS THACHER, *Of Counsel.*

150 [Endorsed:] 4798 Supreme Court, State of Colorado. American Smelting and Refining Company, *vs.* The People of the State of Colorado on the Relation of Henry A. Lindsley, district attorney for the second judicial district of the State of Colorado. Petition for writ of error and assignments of error. Filed

151 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, To The Honorable the Supreme Court of the State of Colorado; Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of plea, which is in the said The Supreme Court of the State of Colorado, before you, or some of you, being the highest court of law or equity of the said State of Colorado in which a decision could be had in a suit between The People of the State of Colorado On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado, Plaintiff, and American Smelting and Refining Company, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State of Colorado, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error hath happened, to the great damage of the said American Smelting and Refining Company, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your Seal, distinctly and openly you send
152 the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington within Thirty (30) days from the date hereof; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, the tenth day of October, in the year of our Lord one thousand nine hundred and five.

[Seal United States Circuit Court, District of Colorado.]

CHARLES W. BISHOP,
Clerk of the Circuit Court of the United States within and for the District of Colorado.

The above writ is hereby allowed, October tenth 1905.

WILLIAM H. GABBERT,
Chief Justice and Presiding Justice of the

Return.

UNITED STATES OF AMERICA, *State of Colorado, ss:*

In obedience to the command of the within Writ, I herewith transmit to the Honorable The Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, and with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of the State of Colorado, at the City and County of Denver, in said State, this 21st day of October, A. D. 1905.

[Seal Supreme Court, State of Colorado.]

HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.
By JAMES PERCHARD, *Deputy.*

153 [Endorsed:] Supreme Court, State of Colorado. American Smelting and Refining Company, *vs.* The People of the State of Colorado, On the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado. Writ of Error. Filed in Supreme Court, Oct. 10 1905 at 3 o'clock p. m. Horace G. Clark, Clerk.

154 UNITED STATES OF AMERICA, *ss:*

To the People of the State of Colorado on the Relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado; Greeting:

You are hereby cited and admonished To be and appear at a Supreme Court of the United States, at the City of Washington, in the District of Columbia, within Thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the Clerk's office of the Supreme Court of the State of Colorado, wherein American Smelting and Refining Company, a Corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said Writ of Error mentioned, should not be corrected, and speedy justice should not be done in that behalf.

Witness, The Honorable William H. Gabbert, Chief Justice of the Supreme Court of the State of Colorado, this tenth day of October, in the year of our Lord one thousand nine hundred and five.

WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

Personal service of the above and foregoing Citation, by receipt of a full, true and correct copy thereof, is hereby admitted at Denver, State of Colorado, this 16th day of October, A. D. 1905.

N. C. MILLER,
Attorney for the Defendant in Error.
N. C. MILLER,
Attorney General of the State of Colorado.

(W.8:10:9:05)

155 [Endorsed:] # 4798 American Smelting & R. Co appellants v The People &c & appellees Filed in Supreme Court October 17th 1905 Horace G. Clark Clerk By James Perchard Deputy

156 Know all men by these presents, That we, American Smelting and Refining Company, a corporation, as principal, and American Securety Co. of N. Y., as sureties, are held and firmly bound unto The People of the State of Colorado on the relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado in the full and just sum of Six Thousand ($6000.00) dollars, to be paid to the said The People of the State of Colorado their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of October, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a term of the Supreme Court of the State of Colorado in a suit depending in said Court, betewen American Smelting and Refining —, Appellant and The People of the State of Colorado on the relation of Henry A. Lindsley, District Attorney for the Second Judicial District of the State of Colorado a certain final judgment was rendered against the said American Smelting and Refining Company and the said American Smelting and Refining Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The People of the State of Colorado on the relation of Henry A. Lindsley District Attorney as aforesaid citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within 36 days from the date thereof.

157 *Now, the condition of the above obligation is such,* That if the said American Smelting and Refining Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] AMERICAN SMELTING & REFINING COMPANY,
By FRANKLIN GUITERMAN, [SEAL.]
Its General Manager for Colorado Department.

Sealed and delivered in presence of
M. ALICE PRIOR.
MABLE NANCARROW.

AMERICAN SURETY COMPANY OF NEW YORK.
By NEWCOMB CLEVELAND,
Resident Vice-President.

Attest:
EDMON G. BENNETT,
Resident Assistant Secretary.

Approved by:
WILLIAM H. GABBERT,
Chief Justice of the Supreme Court of the State of Colorado.

October tenth, 1905.

158 *Extract from the Record Book of the Executive Committee of the American Surety Company of New York.*

"A meeting of the Executive Committee of the American Surety Company of New York was held on the 26th day of April, 1905.

* * * * * * *

"The following resolution was adopted:

"Resolved, That Newcomb Cleveland, of Denver, Colorado, be and he is hereby constituted and appointed a Resident Vice President of this Company at Denver, aforesaid, with full power and authority to execute and deliver any and all surety bonds and undertakings, for or on behalf of this Company in its business and in accordance with its charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto and to be attested by the signature of a Resident Assistant Secretary of this Company at Denver, aforesaid vice Harry Schiffer, resigned."

STATE OF NEW YORK, *County of New York, ss:*

I, R. R. Brown, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Executive Committee of the American Surety Company of New York, with the original record of said Executive Committee, and
159 that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution; and that the said resolution has not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 18th day of August, 1905.

[SEAL.] R. R. BROWN.

160 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

"The regular quarterly meeting of the Board of Trustees of the American Surety Company of New York was held at the Company's office, No. 100 Broadway, in the City of New York, on Wednesday, January 18, 1905, at 12 o'clock noon.

* * * * * * *

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 21, 1904, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

"We nominate for * * *

Resident Vice Presidents at Denver, Colorado:
Jos. A. Thatcher,
Frank Evans.
Resident Assistant Secretaries at Denver, Colorado:
W. Scott Bicksler,
Edmon G. Bennett.

* * * * * * *

161 "Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, and for the members of the Committee on Accounts, as recommended by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * * * *

"The following resolution was adopted:

"Resolved, that the resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

* * * * * * *

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York,

with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further
162 certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at
[SEAL.] the City of New York, this 26th day of Sept., 1905.

F. J. PARRY,
Assistant Secretary.

(Endorsed:) Filed in Supreme Court, Oct. 10 1905 at 3 o'clock P. M. Horace G. Clark Clerk.

163 In the Supreme Court of the State of Colorado.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO on the Relation of HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado, Defendant in Error.

Certificate of the Clerk of the Supreme Court of the State of Colorado.

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify That the above and foregoing is a full, true, complete and correct transcript of the record in the above entitled cause, as the same now remains on file in my office; that, as required by law and the Writ of Error from the Supreme Court of the United States herein filed, I herewith transmit the same to the Supreme Court of the United States, together with the original Petition for Writ of Error, the original Writ of Error and original Assignments of Error and the original Citation with the proof of service thereof.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said The Supreme Court of the State of Colorado, at Denver, Colorado, this 21st day of October, A. D. 1905.

[Seal Supreme Court State of Colorado.]

HORACE G. CLARK, *Clerk*,
By JAMES PERCHARD, *Deputy*.

Endorsed on cover: File No. 19,951. Colorado Supreme Court. Term No. 449. American Smelting and Refining Company, Plaintiff in Error, *vs.* The People of the State of Colorado on the relation of Henry A. Lindsley, district attorney for the second judicial district of the State of Colorado. Filed November 3d, 1905. File No. 19,951.

FILE COPY.

Office Supreme Court,
FILED,
NOV 24 190
JAMES H. McKEN

Supreme Court of the United States,

OCTOBER TERM, 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,

v.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

BRIEF FOR PLAINTIFF IN ERROR.

THOMAS THACHER,
Of Counsel.

EVENING POST JOB PRINTING OFFICE, NEW YORK.

Supreme Court of the United States,

OCTOBER TERM, 1906.

AMERICAN SMELTING AND REFINING COMPANY, Plaintiff in Error, v. THE PEOPLE OF THE STATE OF COLORADO, on the relation of HENRY A. LINDSLEY, District Attorney, &c.	No. 143.

BRIEF FOR PLAINTIFF IN ERROR.

The writ of error herein (pp. 65–70) brings up for review a judgment of the Supreme Court of Colorado, affirming a judgment of the District Court in Denver, in an action of *quo warranto* brought by the People on the relation of the District Attorney against the plaintiff in error, a New Jersey corporation, to make it answer

> "by what warrant it claims to have, use and enjoy the powers, privileges and franchises aforesaid [that is, such as it got by complying with the Colorado laws as to foreign corporations], and the right to do business as such corporation within the limits of said State,

> and why the *franchise and charter* [secured by compliance with such laws] should not be adjudged *forfeit*, and the respondent *ousted* of the same" (pp. 2-4).

The judgment in the lower court (pp. 34 and 35) is that this corporation has

> "*forfeited its right to do business* within the limits of the State of Colorado until such tax is paid, and it is absolutely and wholly *deprived* of all *rights and privileges* within the State of Colorado, until such tax is paid,"

the tax referred to being "an annual State corporation license tax," amounting to $4,000, found to be due on May 1, 1902, by force of an act of the Legislature of Colorado entitled "An Act in relation to public revenue and repealing all previous acts or parts of acts in conflict therewith," approved March 22, 1902.

The contention of the plaintiff in error being that this act, as so applied to it, is unconstitutional as impairing the obligation of a contract and as denying to this corporation the equal protection of the laws, the status of the corporation at the time when the act was passed becomes important.

There is no substantial dispute about facts,—none at all, except as to whether the corporation in acquiring property in Colorado after compliance with its statutes in April, 1899, relied upon the privilege resulting from such compliance—and that it did, is shown by the testimony of Waterman (p. 48)—and except, also, as to matters not material to this argument. The *facts* stated in the complaint are not denied, and the *facts* stated in the answer, except as aforesaid, are admitted by the reply, conclusions of law not being admitted, of course.

The plaintiff in error, after becoming a corporation under the laws of New Jersey, had, on April 28, 1899, complied with the laws of Colorado relating to foreign corporations, by filing, as required, a cer-

tificate designating a principal place of business in the State and appointing an agent upon whom process might be served, and by filing a certified copy of its certificate of incorporation and of the New Jersey law under which it was incorporated (Complaint, p. 2; Answer, pp. 9–10; Reply, pp. 23–24), and by paying to the Secretary of State "for the use of the State" $9,792.50 (Answer, p. 10; Reply, p. 24), and thereby on said day, as the complaint states (p. 2), it "became and was authorized or permitted to do business in the State of Colorado as such corporation, under and by virtue of the laws of the said State of Colorado"; and from that time on, it "has been and still is doing business as such corporation in the said State of Colorado" (p. 3). On May 17, 1901, the corporation filed, as required by the law of Colorado, a copy of an amendment of its certificate of incorporation increasing its capital stock, and paid to the Secretary of State "for the use of the State," the further sum of $5,250, making, with the sum paid in April, 1899, a total of $15,042.50 so paid for whatever it got by complying with the laws of that State in regard to foreign corporations.

What it so got, depends on the law as then existing. The law bearing on this question was as follows:

Constitution, Art. 15, Sec. 10, which reads:

> "No foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

Mills' Annotated Statutes, Sec. 499, providing that "foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate" as therein described and directed, and that "such corporation shall be subjected to all the liabilities, restrictions

and duties which are or may be imposed upon such corporations of like character organized under the general laws of this state."

Mills' Ann. Stats., Sec. 500, providing that every corporation incorporated by certificate under a general corporation law shall file with the Secretary of State a certified copy of such certificate and of such law.

Mills' Ann. Stats., Sec. 502, providing for payment of a filing fee, and also providing that copies of such charters, statutes and certificates, duly certified, shall be received in the courts "as sufficient evidence of the corporate character of such incorporations, and of all their powers, duties and liabilities."

Mills' Ann. Stats., Sec. 1867, as to filing and recording fees.

And, lastly, Laws of 1897, Chap. 51, providing that every stock corporation, domestic or foreign, on filing its certificate of incorporation, "shall pay to the Secretary of State for the use of the State a fee," which, if the capital stock exceeds $50,000, is fifteen cents on each $1,000 of such excess, and a like fee on each $1,000 of any increase, and that "no such corporation * * * shall have or exercise any corporate powers, or be permitted to do any business in this State until the said fee shall have been paid."

It was under this law last mentioned that the sums aforesaid, aggregating $15,042.50, were paid to the Secretary of State for the use of the State. Manifestly they were paid in order that the corporation might have or exercise its corporate powers and be permitted to do business in the State, or, to follow the form of expression used in the complaint, that it might be "authorized or permitted to do business in said State of Colorado as such corporation"; and to evidence the privilege so purchased, the Secretary of State, on May 21, 1901, gave to the corporation a certificate that it had made full payment of fees and was "authorized to

exercise any corporate powers provided for by law." This certificate was given in accordance with Laws of 1901, p. 121, § 10, 3 Mills. Ann. Stats., 238 (Rec., p. 12).

The law of 1902 found the corporation exercising the privilege so purchased. Since April, 1899, it had been and still was doing business in Colorado, having acquired and being engaged in operating properties there of a value of millions of dollars.

The general effect of that law, if it is valid, is to require the corporation to make further payments annually, if it would continue to exercise the privilege of doing business in Colorado, and to require it to make larger payments than domestic corporations in like circumstances.

The pertinent sections of the law are as follows:

> "SEC. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this State, and having a capital stock of $25,000.00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado as follows:
>
> Two cents upon each one thousand dollars of its capital stock."

> "SEC. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and *as a condition precedent to its right to do any business within the limits of this State*, pay annually, on or before first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the

case may be, to the auditor of the State of Colorado, a State license tax as follows:

Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

"SEC. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

Specification of Errors.

The plaintiff in error contends:

(1.) That a contract resulted from its compliance with the law of Colorado in 1899 and 1901, and that the law of 1902, if valid, would impair the obligation of that contract, and hence it is void under Sec. 10 of Art. 1 of the Constitution of the United States.

(2.) That the corporation was, when the law of 1902 was passed, a person within the jurisdiction of the State of Colorado, and that that law, if valid, would deprive it of the equal protection of the law, and hence it is void under the Fourteenth Amendment to the Constitution.

If the law is void for either reason, the judgment of the Supreme Court of Colorado was erroneous, of course.

Assignment of Errors, pp. 66 to 69.

POINTS.

I.

The law of 1902 is void because it would impair the obligation of the contract between the corporation and the State of Colorado which resulted from compliance by the former with the laws of the latter relating to foreign corporations, including the payment to the State in April, 1899, of $9,792.50 and the payment in May, 1901, of $5,250, on increase of stock.

A.

A binding contract between the State and the corporation was thus made—a contract based upon a valuable and substantial consideration.

The transaction was a purchase of a franchise. Such franchise was of the same character as the franchise enjoyed by a domestic corporation, and it was bought and paid for.

For a consideration, the State granted the right to do business as a corporation to an association already incorporated under the laws of another State, with precisely the same effect as under its general corporation law it grants the same right to an association not elsewhere incorporated.

The franchise of doing business as a corporation given by one State is not operative beyond its boundaries. This association could not claim such franchise in Colorado because it had secured it in New Jersey. The law of New

Jersey had no extra-territorial power. The association could secure a like franchise operative in Colorado only from that State. But it found provision made therefor in its statutes. Certain things it must do—very similar to what must be done to incorporate in Colorado originally—and certain payments must be made, and thereby the association would acquire the right to do business as a corporation in Colorado. It did these things, it made the payments required; and so it got that right.

It was expressly provided that it should be subject to "all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of this State." It is so subject. There is no dispute about this. But incorporation or the privilege of doing business as a corporation, this association, theretofore incorporated in New Jersey, got from the State of Colorado, as fully and completely as it might have got it by originally incorporating under the Colorado law; subject to liabilities, restrictions and duties *in like manner* as companies originally incorporated there; *and not otherwise*.

The intention of the Colorado law was to create substantial uniformity as to corporations, whether originally incorporated in or out of the State, which have complied with its conditions for acquiring the right of incorporation within its boundaries.

And this was decided by the Supreme Court of that State in *Iron Silver Mining Co.* v. *Cowie*, 31 Col., 450. It was there held that the twenty year restriction of the continuance of corporate existence, or in other words, of the right of doing business in the State, applied to foreign corporations which had secured such right. The Court in disposing of a preliminary question as to jurisdiction, held that what the foreign corporation had got by such compliance, was a *franchise*. Remarking that the statute was substantially the same as the Illinois

law, the Court quoted from the opinion in Stevens *v.* Pratt, 101 Ill., 208, 217, as follows:

> "The manifest and only purpose was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations of like character and bring them all under the influence of the same law."

And it held the twenty year restriction applicable to foreign corporations, because otherwise there would not be "that uniformity in the powers, liabilities, duties and restrictions of the two kinds of corporations, which it was the object of this clause to secure."

Compliance with the law by a foreign corporation, including payment of the required fee (to use the language of the Supreme Court of Colorado in this case), "entitles it to come into that State to do business as a corporation, and gives it a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the Secretary of State and pays the prescribed fee therefor" (p. 60).

The franchise being substantially the same as the corporate franchise of a domestic corporation, the grant thereof, being made for a valuable consideration, is a contract within the protection of the Constitution.

Formerly the rule of comity was relied upon for permission to exercise the franchise of doing business as a corporation, outside of the State of original incorporation. In Colorado and in almost all the States, this rule is supplanted by statute law. Many such laws require filing of papers, appointment of an agent, &c., but no substantial payment. But the law before the Court, following a somewhat general later practice, requires payment of a substantial sum for the use of the State as the price of the franchise.

Every franchise is not a contract. It may be a mere revocable license. A necessary element of a

contract is a consideration. This is true of a contract between a corporation and the State.

It is not necessary to consider whether investments made upon the faith of such a franchise are sufficient consideration, so that thereafter the grant of the franchise must be deemed a binding contract. (*Powers* v. *Detroit, &c., Ry. Co.*, 201 U. S., 543). For in this case not only was such investment made up to millions, but a substantial sum was required to be paid and was paid at the time of the grant. Here there can be no question as to the consideration.

Not until the State sets a price upon such franchises, do all the elements of a contract appear immediately. But when the State *sells* such a franchise, there is a contract, the obligations of which cannot be impaired by subsequent legislation. The grant itself may reserve the right, under certain conditions, to revoke or amend the franchise; and then, of course, revocation or amendment *according to the terms of such reservation* is permissible. But the obligation of the contract, whatever its extent or its limitations, cannot be impaired.

Examples of grants of franchises to foreign corporations, which were mere licenses—not contracts--because they lacked the element of consideration, may be found in the decisions of this Court.

In many cases this Court has refused to hold a franchise of exemption from taxation to be a contract, impaired by subsequent laws, because no consideration was given.

This Court has never held that a franchise to do business as a corporation, *granted for a valuable consideration*, is a mere revocable license.

In this case an application is made to the State of Colorado for a charter—for authority to do business *as a corporation* in the State, or, in other words, for the privilege of incorporation in the State. A substantial payment is required, and such payment being made the charter is granted; and thereafter the corporation invests millions in the

State and proceeds to do business there. There is more here than in the Dartmouth College case. To use the words of Chief Justice Marshall: "It can require no argument to prove that the circumstances *of this case* constitute a contract"—a contract protected by the Constitution.

As held by the Supreme Court of Colorado in this case, this company got by purchase substantially what is given for a consideration in the incorporation of a domestic corporation.

B.

The contract was that, in consideration of the payments made, the corporation should have the right to do business in the State as a corporation for twenty years, subject, of course, to the same liabilities, restrictions and duties as domestic corporations.

There is no time limit set otherwise than by reference to the law relating to domestic corporations (Mills Ann. Stat., § 473). Without this limit the privilege would be perpetual. With this limit it is restricted to twenty years (Iron Silver Mining Co. *v.* Cowie, *supra*).

What the corporation got in this case was not a mere revocable license.

In Home for the Friendless *v.* Rouse, 8 Wall., 430, speaking of an act giving an exemption from taxation without any time stated, this Court said:

> "To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the Legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value, if the Legislature, without taking di-

> rect action on the subject, could at its will resume the power of taxation."

Quoted with approval in
Powers *v.* Detroit, etc., Ry. Co., 201 U. S., 543.

The right is subject to the same liabilities and restrictions as the similar right of domestic corporations. But unless provision can be found under which the right of a domestic corporation to do business may be terminated within the period of twenty years, then the right of a foreign corporation, which has complied with the law, cannot be terminated within a corresponding period.

If an individual had sold the right to do business on his premises and received a substantial sum therefor, would he be heard to claim that what he had sold was nothing but the right to do business so long as he chose to permit? Could he arbitrarily, or in any way except in pursuance of some right expressly reserved, terminate the right as soon as he had got the money paid for it in hand?

There is nothing contrary to this contention, in the opinion of the Supreme Court of Colorado. Indeed, it is distinctly held that by compliance with the law this corporation acquired

> " a standing similar to that which is secured by a domestic corporation which files its original certificate of incorporation with the Secretary of State and pays the prescribed fee therefor."

C.

The Law of 1902, therefore, must be condemned as impairing the obligation of such contract, unless it can be justified under the provision by which alone the grant is limited, that the corporation shall be subjected to the liabilities, restrictions and duties imposed on like domestic corporations.

D.

It cannot escape condemnation upon the charge that it impairs the obligation of contract, by reference to the reservation of power to alter, revoke or annul corporate charters.

Article 15, Section 3, of the Colorado Constitution provides:

> "The general assembly shall have power to alter, revoke or annul any charter or incorporation now existing and revocable at the adoption of this constitution, or any that may hereafter be created, *whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the corporators.*"

The power to alter or revoke is not absolute. It is materially qualified.

There is a wide distinction between the power to alter or annul here reserved, and the unrestricted reserved power in the laws and constitutions of many States. This is clearly pointed out by this Court in *Vicksburg* v. *Vicksburg Water Works Company*, 203 U. S. As clearly as in that case the burden here sought to be imposed works injustice to the corporators of defendant. It compels them to pay again and to pay twice as much as like domestic corporations for the power to continue to carry on its business during the twenty years for which it received a franchise.

It could not possibly have been the opinion of the General Assembly that the charters or incorporations affected were injurious, since the law relates to every corporation, domestic and foreign, doing business in the State, and attempts to prevent them from doing business only until the so-called license tax is paid.

This article was not relied upon by the Attorney-General in the Colorado courts; and it is presumed it will not be relied upon here.

E.

Nor can it escape such condemnation, by reference to Section 654 of the law in regard to corporations.

That section provides that

> "The general assembly may, at any time, alter, amend, or repeal this act, and shall, at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act."

This statute must be read with the constitutional provision last referred to, which limits the power of the Legislature to alter or amend charters by conditions expressed in the words in italics. The people of Colorado wrote these words into their constitution to protect investments made in that State through corporate stocks and bonds from destruction or impairment by arbitrary or unnecessary action by the Legislature. The people have declared that the Legislature cannot reserve absolute power to alter or amend charters.

Nothing is pertinent here unless it be "to prescribe such regulations and provisions as it may deem advisable," and this can be applicable to foreign companies only because they are subjected to the *same* liabilities as domestic companies. It cannot justify putting upon foreign companies a *double burden* as compared with domestic companies.

Nor was this section relied upon by the Attorney-General in the Colorado courts.

F.

Nor can it escape such condemnation by reference to the taxing power of the State.

Liability to taxation is common to all persons, natural or corporate, with respect to their property in the State, except in case of special exemption. This company does not claim exemption from taxation; it merely denies the power of the State to make it buy again what it has already bought and paid for. The Legislature may tax the franchise, as it may tax other property, but it cannot destroy the title thereto, or require it to be bought again *as a condition of its further enjoyment.* If land is sold by the State, the Legislature may tax the land, but it cannot recall the title, or require a further payment to be made *as a condition* of its further use.

The Law of 1902 does not impose a tax upon the franchise; indeed it does not impose a tax at all, if the word is used in a proper sense.

In *Metropolitan Street Railway Co.* v. *New York*, 199 U. S., 1, and *Brooklyn City R. R. Co.* v. *New York*, 199 U. S., 48, the tax considered was indisputably a tax upon the franchise as property. It was not a "license fee" which "is understood to be a charge *for the privilege of carrying on a business or occupation*" (199 U. S., 50). The franchise was held to be taxable because "it is *property* which, though intangible, exists" (199 U. S., 39). "As it is *property*, it is required to contribute its ratable share, dependent only upon value, toward the support of the Government." The franchises considered in these cases were prerogative franchises, not mere corporate franchises, not mere grants of the privilege of incorporation. In *Home Ins. Co.* v. *New York*, 134 U. S., 594, and in Horn Silver Min-

ing Co. *v.* New York, 143 U. S., 305, a like view seems to have been taken of a *tax upon* the "corporate franchise or business." See also, *State Railroad Tax Cases*, 92 U. S., 575; Central Pacific R. Co. *v.* California, 162 U. S., 91, 127.

But that is not the nature of the tax (so called) in this case. It is not a tax upon a franchise, but a license fee required *as a condition* of the right to do business as a corporation. But this right had already been granted to this company, this right it already had, having bought and paid for it; it had already *entered the State* under a franchise to do business there as a corporation, theretofore granted to it and which it was then enjoying. This franchise might be taxed, subject to all the constitutional limitations upon the taxing power. But it is not taxation to require the payment of "a conventional price or bonus" for the further enjoyment of the franchise already acquired by purchase.

In *Adler* v. *Whitley*, 44 Ohio St., 539, the Court said:

> "The difference between a tax upon a business and what might be termed a license is that the former is exacted by reason of the fact that the business is carried on, and the latter is exacted as a condition precedent to the right to carry it on.

There are no constitutional limitations as to conditions which may be imposed for the *admission* of foreign corporations. The State may be as arbitrary as it pleases (Paul *v.* Virginia, 8 Wall., 168; Pembina Cons., &c., Mining Co. *v.* Pennsylvania, 125 U. S., 183). But when, after admission, it *taxes* the franchise or right to do business, as it may do, then it is constrained by the limitations of the Federal and State Constitutions. What the State of Colorado undertook to do in this law was to impose a license fee *as a condition of doing business*, not to *tax* the franchise or *right to do business*

already acquired. A license fee and a tax upon a franchise or business are two different things.

In respect to the meaning and effect of the Law of 1902, this Court will not be concluded by the opinion of the Supreme Court of Colorado.

> *Atchison, Top. & S. F. Ry. Co.* v. *Matthews*, 174 U. S., 100.
> *Sterns* v. *Minnesota*, 179 U. S., 223.
> *Powers* v. *Detroit, &c., Ry. Co.*, 201 U. S., 543.

The Law of 1902, § 65, provides that

> "every foreign corporation which has heretofore obtained * * * the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and *as a condition precedent to its right to do any business within the limits of this State*, pay annually * * * to the Auditor of the State of Colorado, a State *license* tax as follows-"

The next section provides the penalty that the corporation shall "*forfeit its right to do business* within the limits of this State, until such tax is paid, and shall be absolutely and wholly *deprived of all such right and privilege;* and the fact of such failure may be pleaded," &c.

There is no other penalty. There is no method of collecting this so-called tax.

Section 68 of the law calls this a *fee:* "The *fees* provided for in Sections 64 and 65 are in addition to the other *fees* and *taxes* provided by law."

Is not this clearly a license fee fixed as a condition of doing business and not a tax upon the franchise or business?

It is by its very terms a *license* fee. It cannot be "construed" to be a tax. And to so construe it, would bring it into conflict with the Colorado Constitution, which provides (Art. X., sec. 3): "All taxes shall be uniform upon the same class of sub-

jects within the territorial limits of the authority levying the tax;" the act imposing on foreign corporations such as this *double* the burden imposed upon like domestic corporations.

The distinction between license fees and taxes is elucidated by two cases of the same title—*Erie Ry. Co.* v. *Pennsylvania*—one in 21 Wall., 492, and the other in 153 U. S., 628.

In 1841 Pennsylvania passed an act permitting a New York corporation to operate its railroad in the State for a distance of fifteen miles. In 1846 the company was authorized to extend its road, one condition being that the company should pay the State annually $10,000, and that stock of the company to an amount equal to the costs of construction of the railroad in Pennsylvania should be taxed at the same rate as other similar property, the company making payment of the tax upon such stock to the State.

In 1868 the Legislature imposed a *tax* on the gross receipts of all railways doing business in the State. The Court held that nothing being said in the original grant about exemption from further taxation, the obligation of contract was not impaired. The payments imposed by the earlier laws were a price for the franchise or right to build and operate the railroad in Pennsylvania, and a tax upon a part of the stock. The later tax, the legality of which was questioned, was a general property tax imposed upon gross receipts, and was neither in form nor substance a demand of further payment for the right the State had sold the company to build its road and operate in Pennsylvania (21 Wall., 492).

In 1885 a law was passed requiring the treasurer of every corporation doing business in the State to deduct three mills on every dollar of interest paid on its bonds held in the State. The Court held that this act violated the obligation of a contract, saying:

> "Those acts prescribe the terms and conditions upon which Pennsylvania assented to

the company's constructing and operating its road through limited portions of its territory. * * * Consistently with those terms and conditions Pennsylvania cannot withdraw the assent which it gave, upon a valuable consideration, to the construction and operation of the defendant's road within its limits. Nor can the right of the company to enjoy the privileges so obtained be burdened with conditions not prescribed in the acts of 1841 and 1846, except such as the State, in the exercise of its police powers, for purposes of taxation, and for other public objects, may legally impose in respect to business carried on and property situated within its limits."

"The argument in behalf of the State leads, logically, to the conclusion that, notwithstanding the provisions of the acts of 1841 and 1846, prescribing the terms upon which the company acquired the privilege of constructing and operating its road in that State, Pennsylvania could, in its discretion, change those terms and impose any others it deemed proper. If the State amended those acts so as to increase the sum to be paid annually into the state treasury, as a bonus, from ten thousand to one hundred thousand dollars, the argument made by its attorney general would sustain such legislation upon the ground that the State, at the outset, could have exacted the larger amount from the company as a condition of its entering the State with its road. To any view which assumes that the State could—so long at least as the railroad company performed the conditions of the acts of 1841 and 1846—burden the company with conditions that would substantially impair the right to maintain and operate its road within Pennsylvania upon the terms stipulated in those acts, we cannot give our assent."

(153 U. S., 628.)

The Law of 1897 under which this company paid $15,000 and more for the privileges of incorporation, provides that the fee shall be paid on filing the certificate of incorporation and that no corporation "shall have or exercise any corporate powers, or be

permitted to do business in this State until the said fee shall have been paid"; and of this the Supreme Court of Colorado in this case says:

> "The fee * * * *is not, in any sense, a tax.* It is the conventional price or bonus which the corporation pays to the State for the privilege of entering this State to do business as a corporation."

The Law of 1902 says that this company must on May first in each year pay a so-called license tax "*as a condition precedent to its right to do any business within the limits of this State*"; and nonpayment simply works a forfeiture of the right. Using the words of the Supreme Court of Colorado, we say of this co-called license tax that it "*is not, in any sense a tax*"; and so it cannot be justified under the taxing power.

If this license fee were really a tax, a tax upon the franchise as property, it would violate the Constitution of Colorado requiring uniformity in taxation. The Supreme Court of Colorado, in holding that there is no violation of this provision, practically holds that this is not a case of *taxing* franchises as property, like the cases arising under the New York Franchise Tax in 199 U. S. The same thing cannot be a *tax*, to avoid the provision of the Colorado Constitution which forbids bills containing more than one subject and requires the subject to be expressed in the title, and to avoid the Federal prohibition against laws impairing the obligation of contract; and "*not a tax*," to avoid the constitutional requirement of uniformity in taxation, and the provisions of the Fourteenth Amendment. In Graham *v.* Folsom, 200 U. S., 253, it is said: "But Courts cannot permit themselves to be deceived. They will not inquire too closely into the motives of the State, but they will not ignore the effect of its action." This Court not being required to accept the decision of the Colorado Court as to

the meaning of this act certainly will not follow that Court into such inconsistencies. It will find that though these provisions are inserted in a revenue law that they really impose a license fee "as a condition precedent" to the further exercise of a privilege heretofore granted, they really attempt to make the company buy again what it has already bought and paid for and so to impair the obligation of the contract of purchase; or if this Court shall be able to find that this law imposes a tax, it will not forget this finding, when it comes to consider whether it violates the rule of equal protection. (See Point II.)

G.

Foreign corporations are not outside of the protection of the Constitution, for the reason that the States may impose conditions as to their admission.

In his dissenting opinion in *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S., 308, 332, Mr. Justice Harlan says:

> "It is one thing for a State to forbid a particular foreign corporation, or a particular class of foreign corporations, from doing business at all within its limits. It is quite another thing for a State to admit or license foreign corporations to do business within its limits, and then subject them to some statutory provision that is repugnant to the Constitution of the United States. If a corporation, doing business in Texas under its license or with its consent, insists that a particular statute or regulation is in violation of the Constitution of the United States and cannot therefore be enforced against it, the State need only reply—such seems to be the logical result of the present decision—that the statute or regulation is a condition of the right of the corporation to do business, and, whether

constitutional or not, must be respected by the corporation."

In that case the law questioned was on the statute books when the corporation was admitted, when it got its permit to do business. Mr. Justice Harlan and Mr. Justice Brown maintained that notwithstanding that fact, the corporation could question its constitutionality. There is nothing in the opinion to indicate—and it cannot be believed—that the majority would have disputed the right of the corporation to question the constitutionality of the law, if it had originated after the corporation acquired the right to do business in the State.

II.

The corporation was a person within the jurisdiction of the State of Colorado, and the Law of 1902 was void because it did not give to it the equal protection of the law.

A.

The corporation was a person within the jurisdiction of the State of Colorado.

"A corporation is a person within the protection of the Fourteenth Amendment."

Lake Shore & M. S. R. R. Co. *v.* Smith, 173 U. S., 688, 690.

Citing:

Minneapolis & St. Louis R. R. Co. *v.* Beckwith, 129 U. S., 26.

Smythe *v.* Ames, 169 U. S., 522.

These decisions apply, notwithstanding this corporation was originally incorporated under the laws of another State.

It is not questioned that, as said by the Supreme Court of the United States in *Pembina Cons. &c., Mining Co.* v. *Pennsylvania*, 125 U. S., 183:

> "The States may, therefore, require for *the admission* within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment."

But after their admission, in other words, when they are lawfully within the State by compliance with the conditions imposed by its statutes, especially when such conditions involve the payment of money, then they are persons within its jurisdiction and are protected by this clause of the Fourteenth Amendment. This is implied, at least, in the opinion in that case.

In *Philadelphia Fire Association* v. *New York*, 119 U. S , 110, Mr. Justice Harlan, dissenting, says:

> "Under the decision just rendered, the State of New York is permitted to subject a corporation of another State, within her limits by her consent, to higher taxes with respect to its business than is imposed there upon similar corporations of other States."

The difference between Mr. Justice Harlan and the majority of the Court seems to have been upon the question whether the corporation was within the limits of New York by her consent, the position of the majority, as stated in the headnote in the Lawyers' Edition, being as follows:

> "A foreign corporation is not within the jurisdiction of the State of New York until it

> has complied with the laws of the State as to payment of license fees, taxes and deposit of securities, &c. A corporation having complied with the law and received a license *for a year* is within the State *for that year;* but it is within the power of the State to change the conditions of admission at any time *as to the future*, and if it makes such a change for the future the foreign corporation is not within the State *after the expiration of the year* for which it was licensed *until it has complied with the law.*"

It is not understood that the majority took exception to Mr. Justice Harlan's statements in the next paragraph of his opinion. Referring to the announcement of the Chief Justice in *Santa Clara Co.* v. *Southern Pacific R. R. Co.*, 118 U. S. 396, that the Court did not wish to hear arguments on the question whether this provision of the Fourteenth Amendment applied to corporations, and that the Justices were all of opinion that it did, Mr. Justice Harlan says:

> "This, it is true, was said in regard to corporations of the particular State where legislation was assailed as unconstitutional; but it is equally clear that a corporation of one State, doing business in another State *by her consent*, is to be deemed a 'person' within the jurisdiction of the latter State, in the meaning of the Fourteenth Amendment."

Nor is it understood that the majority took exception to what Mr. Justice Harlan said in the next paragraph:

> "So a corporation of one State doing business by its agents in another State *by the latter's consent* is denied the equal protection of the laws, if its business there is subjected to higher taxation than is imposed upon the business of like corporations from other States."

It may or may not be true, that a corporation admitted by a mere license, revocable at will, is practically outside of such protection, when the Legislature impliedly revokes such license by enacting new conditions of its stay. We need not argue that case; it is not the case before the Court. This corporation got the right to do business as a corporation in Colorado, or in other words got the privilege of incorporation in that State, by grant and for valuable consideration. It is not then under a mere license revocable at will. It got from the State of Colorado substantially what it would have got by original incorporation there, or, to quote from the opinion in this case, "*a standing similar to that which is secured by a domestic corporation which files its original certificate*," &c. (see Point I., A).

If the fiction of the artificial person or legal entity, and the theory that incorporation *creates* such person or entity, are applied to this body of natural persons, which acquired the privileges of incorporation first in New Jersey and later in Colorado, we may say, in the language of the Court in *Ohio & Mississippi R. R. Co* v. *Wheeler*, 1 Black, 286: "It has no legal existence in either State except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised." The corporate existence of this company within the State of Colorado is created—in the language of the fiction—by the laws of Colorado. Precisely to the same extent and for the same reasons as a domestic corporation, it is " a person within its jurisdiction."

In a number of cases where foreign corporations doing business in a State have invoked the protection of the clause of the Fourteenth Amendment forbidding States to deny persons within their jurisdiction the equal protection of the laws, this Court has passed upon the question without questioning that such corporations may be persons within the

jurisdiction of the State. *Oriental Insurance Co.* v. *Daggs*, 172 U. S., 557; *American Sugar Refining Co.* v. *Louisiana*, 179 U. S., 89; *W. W. Cargill Co.* v. *Minnesota*, 184 U. S., 452.

In *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S., 450, this question seems finally to have been passed upon by this Court, the protection of the Fourteenth Amendment being therein held to be effective in favor of a foreign corporation.

B.

The law of 1902 denies to foreign corporations the equal protection of the laws, because it requires them to pay as an annual license tax twice as much as domestic corporations in like circumstances.

See §§ 64 and 65 (*ante*, p. 5), one as to domestic and the other as to foreign corporations. A domestic corporation, if its capital exceed $25,000, is required to pay *two* cents per $1,000; a foreign corporation, whatever its capital, is required to pay *four* cents per $1,000, unless its shares are less than $1, and then *two and one-half* cents per 1,000 shares.

The Fourteenth Amendment requires

> "that no *greater burdens* should be laid upon one than are laid upon others in the same calling and condition."
>
> Barbier *v.* Connolly, 113 U. S., 27, 31,
> Connolly *v.* Union Sewer Pipe Co., 184 U. S., 559.

or, in other words,

> "that the law shall operate equally and uniformly upon all persons in similar circumstances."
>
> *Kentucky Railroad Tax Cases*, 115 U. S., 321, 337,

or, in other words,

> "that all persons subjected to such legislation shall be treated alike under like circum-

> stances and conditions, both in privileges conferred and liabilities imposed."
>
> Hayes *v.* Missouri, 120 U. S., 68.

> "The equal protection of the laws is a pledge of the protection of equal laws."
>
> Yick Wo *v.* Hopkins, 118 U. S., 356.

In *Cotting* v. *K. C. Stock-Yards Co.*, 183 U. S., 79, this Court said:

> "We must, nevertheless, always remember that the equal protection of the laws is guaranteed, and that such equal protection is denied where upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other."

As is said by Mr. Justice Harlan in *Philadelphia Fire Ass.* v. *New York* 119 U. S., 110, 121:

> "An individual is denied the equal protection of the laws if his property is subjected by the State to higher taxation than is imposed upon like property of other individuals in the same community."

He goes on to apply the principle to corporations, domestic and foreign.

The requirement of twice as much from foreign as from domestic companies cannot be justified upon the theory of reasonable classification.

In *Gulf, Colorado & S. F. Ry. Co.* v. *Ellis*, 165 U. S., 150, this Court says:

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to

> the attempted classification—and is not a mere arbitrary selection."

And this is quoted in Connolly *v.* Union Sewer Pipe Co., 184 U. S., 540, 560.

According to this law, every corporation which has obtained the right to do business in the State, whether a domestic or foreign corporation (excepting domestic corporations having less than $25,000 capital) must on May first in each year, as a condition precedent to its continued exercise of that right, pay an annual license tax. This tax is *two* cents per $1,000 for domestic corporations and *four* cents per $1,000 for foreign corporations, except those whose shares are less than $1.00, and for them it is more than *two and one-half* cents per $1,000.

There is no reasonable ground for this difference, this classification. Under Point I. (pp. 7, 8, 9, 13) it has been pointed out that the grant under the general laws of Colorado to domestic corporations upon their incorporation and to foreign corporations upon their complying with the laws herein referred to is in substance the same; foreign and domestic corporations, when this law was enacted, had substantially the same status; sustained the same relations to the State; enjoyed the same contract rights, and were in like manner protected, with respect thereto, by the Constitution. Colorado had substantially said that any association, whether already incorporated elsewhere or not—that did not concern Colorado—might obtain the privileges of incorporation in Colorado, by complying with certain conditions. The fees to be paid were the same, and the requirements were the same otherwise, in substance. If the association had not been incorporated elsewhere, it must file articles of agreement; but if it had already filed such articles elsewhere, that is in the State of original incorporation, a certified copy of such articles and of the general law, which became part thereof in legal effect, could be filed instead. These

requirements being complied with, the corporations differed scarcely at all except in name, and were substantially the same in the view of the State, whose purpose it was to secure

> "uniformity in the powers, liabilities, duties and restrictions of the two kinds of corporations."

It is believed that the thought of such classification would not have occurred to any one, if it were not for the fiction of the creation of a legal entity by incorporation. This is a fiction which has been and is of value and which deserves respect. But it is responsible for some confusion of thought. Nothing is really created by incorporation, of course; but, simply, a privilege is given to individuals to do business under peculiar conditions. This company, in Colorado, has that privilege by the law of Colorado. It is a matter of no concern to Colorado whether the same association of men has the same privilege elsewhere. So far as the State of Colorado is concerned, whatever of incorporation this company has came from its grant—a grant substantially the same and upon the same conditions as if the same association of men had come first to Colorado, without having previously got this privilege in New Jersey. The privilege of doing business here, granted by this State, is precisely the same whether the grantee has or has not such privilege elsewhere. There is no difference to justify the classification made in this law. The difference lies in fiction only.

> "What is reasonable is a question of practical detail, *into which fiction cannot enter.*"
> *Kidd* v. *Alabama*, 188 U. S., 730, 733.

It matters not under what power this law is deemed to be enacted, the taxing power, the police power or any other power, if it violates the rules of equality of protection, it is void.

III.

If the so called "license tax" is really a tax, the law is void under Point II; and if it is not a tax, the law is void under Point I.

The Supreme Court of Colorado calls it a tax for one purpose and treats it as not a tax for another purpose. But it must be one thing or the other.

LASTLY.

The judgment should be reversed, with costs.

THOMAS THACHER,
Of Counsel for Plaintiff in Error.

FILE COPY.

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

Office Supreme Co
FILED
DEC 5 1
JAMES H. McK

THE AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney of the Second Judicial District of the State of Colorado,
Defendant in Error.

No. 143.

Error to the Supreme Court of the State of Colorado.

BRIEF FOR PLAINTIFF IN ERROR.

JOEL F. VAILE,
CHARLES W. WATERMAN,
Solicitors of Plaintiff in Error.

WM. W. FIELD,
Of Counsel.

F. P. Dunbar, Printer, 1703 Lincoln Street, Denver. Phone, 5276.

No. 449.

IN THE

SUPREME COURT

OF THE

UNITED STATES OF AMERICA.

THE AMERICAN SMELTING AND REFINING COMPANY, *Plaintiff in Error*, vs. THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney of the Second Judicial District of the State of Colorado, *Defendant in Error.*	*Error to the Supreme Court of the State of Colorado.*

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

On April 4, 1899, The American Smelting and Refining Company was duly incorporated under the

laws of the State of New Jersey with a capital stock of sixty-five million dollars, which capitalization was, on April 8, 1901, increased to one hundred million dollars (Rec., p. 2). In both its original incorporation and the subsequent increase of its capital stock, said company fully complied with all the requirements of law and of the statutes of New Jersey, and was, by the terms of its charter, endowed with capacity to transact business not only within the limits of the State of New Jersey, but also in various other States of the United States, including Colorado, in the Republic of Mexico and elsewhere; (Rec., p. 9).

On April 28, 1899, the said company, in compliance with the Colorado statutes, filed its charter in the office of the Secretary of State for the State of Colorado, and in the offices of the recorders of the several counties of said State wherein it proposed to carry on its business; appointed an agent for the State of Colorado; located an office in said State; and in all other respects complied fully with the law and the statutes of Colorado, made and provided to authorize it to do business in said State as a foreign corporation: And on May 17, 1901, it further fully complied with the laws and statutes of Colorado relative to the amendment of its charter increasing its capitalization as aforesaid; (Rec., pp. 9-12, 23-25).

The Colorado statutes (S. L. 1897, p. 157) require a foreign corporation, before it should "be permitted to do any business" in said State, to pay to the Secretary of State, *for the use of the State*, the sum of ten dollars upon the first fifty thousand dollars of its capital stock, and for any capitalization "in excess of fifty thousand dollars * * *

the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock."

In compliance with this law, the plaintiff in error paid to the Secretary of State for the State of Colorado, on April 28, 1899, the sum of $9,792.50 upon its original capitalization, and on May 17, 1901, the further sum of $5,250.00 upon the increased capitalization; (Rec. pp. 9-10, 11); and thereupon, as required by law, said Secretary of State for the State of Colorado, issued to the plaintiff in error, on May 21, 1901, under the seal of the State, his certificate, certifying, (Rec., p. 12), "that said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuance of this certificate, and is hereby authorized to exercise any corporate powers provided by law."

The corporate powers of a corporation, under the Colorado statutes, were, among other things, to "have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation." (Colo. G. S., 1883, Sec. 244; 1 Mills' Ann. Stat., Sec. 476, p. 618).

The plaintiff in error thereupon immediately invested five million dollars in round numbers in Colorado property, (Rec., pp. 41, 48); and began to do a smelting and refining business in metalliferous ores in the State of Colorado. Only a small portion,—to-wit: not over twenty per cent., (Rec., pp. 41, 46)—of the property and business of the plaintiff in error was held or carried on in Colorado; and it was

at the same time carrying on a similar business in Utah, Idaho, Montana, California, New Jersey, South Dakota, New Mexico, Arizona, South America, Old Mexico and British Columbia; (Rec., pp. 39, 40, 43).

At this time the laws of Colorado, (G. S., 1883, Sec. 238), limited the life of such domestic corporations to twenty years; and further provided, (G. S., 1883, Sec. 260), that foreign corporations "shall be subject to all the liabilities, restrictions and duties imposed by law" upon Colorado corporations, "and shall have no other or greater powers:" And the Colorado Supreme Court has construed this statute as limiting the rights given to foreign corporations,—no matter what the limit of their life in their parent state,—to twenty years, unless renewed in Colorado by a new filing and a new payment as provided for extension of the life of domestic corporations.

Iron Silver M. Co. v. Cowie, 31 Colo. 450.

Prior to and at the dates above mentioned, the Colorado statutes imposed no charge, tax or fees upon foreign corporations for the right to do business in that State, other than as above mentioned.

Such was the condition of the law at the time that the plaintiff in error concluded to do business in the State of Colorado, paid over $15,000 to said State for the right so to do, invested five million dollars in Colorado property, and entered upon an extensive and expensive smelting and refining business in said State.

The pleadings of the defendant in error expressly

admit that, at the time that the plaintiff in error came into the State of Colorado to do business, and subsequently when it increased its capital stock, the company made payment to the Secretary of State "in full and strict compliance with each and every law and statute of the State of Colorado then existing, relating to doing business in the State of Colorado by foreign corporations"; (Rec., p. 25, fol. 56). By the pleadings it is further admitted that said company *then* complied with all the other laws, requirements and statutes of the State of Colorado relating to foreign corporations doing business in said State; and that at all subsequent times it continued to comply with all the laws and statutes of Colorado, except in the single particular out of which this controversy arose.

Some three years after the said company had entered the State of Colorado, purchased and paid for the right "to do business" therein, established an office there, made extensive investments as above stated, and fully complied with all the existing laws, the Colorado Legislature enacted a statute, approved March 22, 1902, (Colo. S. L. 1902, p. 43-160) which contained the following provisions:

> "Sec. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this State, and having a capital stock of $25,000.00 or over, shall pay, on or before the first day of May of each year, or at the time of obtaining such charter or certificate

of incorporation, and on or before the first day of May of each year thereafter, as the case may be, an annual State corporation license tax to the auditor of the State of Colorado, as follows:

"Two cents upon each one thousand dollars of its capital stock.

"Sec. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the first day of May of each year, or at the time of obtaining such right or privilege, and on or before the first day of May of each year thereafter, as the case may be, to the auditor of the State of Colorado, a State license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; provided, that in cases of foreign corporations the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares.

"Sec. 66. Every corporation which shall have failed to pay the tax provided for in Sections 64 and 65, shall by reason of such failure, forfeit its right to do business within the limits of this State until such tax

> is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

It will be seen that these provisions (Sec. 65) assume, and are predicated upon the assumption and fact, that the "foreign corporations," affected by said Act, had obtained and were entitled to "the right and privilege to transact and carry on business within the State of Colorado."

Said Act provided, (Sec. 66), "that every corporation which shall fail to pay the tax provided for in sections 64 and 65 shall, by reason of such failure, forfeit its *right to do business* within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges," etc.

The plaintiff in error failed and refused to pay the tax* imposed by the above quoted provisions of said statute; and thereupon the State instituted the present suit in *quo warranto*. After trial, the State district court made and entered a judgment which, after reciting the facts of such failure on the part of the plaintiff in error to pay the tax imposed by the Act of March 22, 1902, adjudged that the plaintiff in error "has forfeited its right to do business within

---

* see NOTE, *infra*.

the limits of the State of Colorado until such tax is paid and is absolutely and wholly deprived of all rights and privileges within the State of Colorado until such tax is paid." (Rec., p. 50, fol. 108.)

From this judgment the plaintiff in error appealed to the Colorado Supreme Court, which affirmed the judgment of the court below. The present writ of error is prosecuted to secure in this Honorable Court a review and reversal of that judgment of the Colorado Supreme Court.

---

*NOTE.—In the following argument the word "tax" will be used repeatedly to designate the exaction proposed and imposed by sections 64, 65 and 66 of the Colorado Act of March 22, 1902. To avoid the use of this word would in most cases involve more or less of circumlocution, which would result in an increased length of the brief without any corresponding benefit. At the very outset, therefore, we take occasion to say that the use of said word in this brief for the purpose indicated is not to be taken as an admission or concession that the exaction proposed and imposed by said statute is in any proper or legitimate sense a "tax" or license fee as these terms are ordinarily used and understood. The belief and contention of the plaintiff in error, at all times and under all circumstances in the present discussion, is that the exaction provided for in said statutory provisions is not in any sense properly a "tax" or "license fee," but that it is, as denominated by the Colorado Supreme Court, simply an ad-

ditional "bonus" or "conventional price" arbitrarily demanded by the State of Colorado from this foreign corporation for the privilege of continuing to exercise and enjoy its already vested and contract right to do business as a corporation in said State, "and as a condition precedent to its right to do *any* business within the limits of this State," (see, Sec. 65 of said Act) from and after the date of the Act.

Specification of Errors Relied Upon.

The errors relied upon on this review may be classified under the following general specifications, to-wit:

Specification I. The Colorado Act of March 2, 1902, and the judgment and decree of the State court upholding the constitutionality and validity of the aforesaid provisions of said Act, are in violation of Article I, Sec. 10, of the Federal Constitution prohibiting any State to "pass any * * * *ex post facto* law, or law impairing the obligation of contracts."

This specification primarily covers assignments 4, 7, 14, 32; and incidentally numerous other of said assignments specified below.

Specification II. The said statute, and the judgment and decree aforesaid upholding the same, are in violation of the Fourteenth Amendment to the Federal Constitution in that:

(a) They abridge the privileges and immunities of the plaintiff in error as a citizen of the United States and of one of the States thereof;

(b) They deprive the plaintiff in error of liberty or property, or both, without due process of law;

(c) They deny to the plaintiff in error the equal protection of the law.

This specification primarily covers assignments 1, 3, 5, 6; and also others which will be indicated *infra*.

Specification III. The said statute, and the judgment and decree aforesaid upholding the same, are in violation of Art. IV, Sec. 2, paragraph 1, of the Federal Constitution, in that they deprive the plaintiff in error of rights, privileges and immunities in the State of Colorado secured by the Federal Constitution and the laws of the United States to the plaintiff in error as a citizen of another State.

This specification covers assignments 2, 8, 9, 11, 12, 27, 28, 38 and 39.

Specification IV. Said statute, and the judgment and decree aforesaid, upholding the same, are in violation of the Fifth Amendment to the Federal Constitution, in that it deprives the plaintiff in error of "property, without due process of law," and assumes to "take private property" of said plaintiff in error "for public uses without just compensation."

This specification primarily covers assignments 3, 5, 21; and also other assignments indicated *infra*.

Specification V. Errors of the court below presented and pointed out by the following assignments of error, which might be properly classified

and will be discussed under one or more of the preceding specifications, as being in effect but to point out in detail and to particularize errors controlled by the same general principle or proposition, to-wit:

(a) Art. I, Sec. 10,—Assignments 15 to 20 inclusive, 23 to 26 inclusive, 33 to 39 inclusive;

(b) Fourteenth Amendment,—Assignments 10, 11, 12, 21, 26, 34, 35, 38 and 39;

(c) Fifth Amendment,—Assignments 26, 34, 35, 38 and 39;

Specification I.

Impairing the Obligation of Contracts.

Plaintiff in error contends that said provisions of the Colorado Act of March 22, 1902, and the judgment and decree of the Colorado court in the present case, violate the prohibition contained in the Federal Constitution against "impairing the obligation of contracts."

This prohibition is violated in two respects, to-wit:

(1) By the above quoted Sec. 65 of said Act, (Colo. S. L. 1902, p. 73), by which the State of Colorado undertakes to require the plaintiff in error to pay a new and additional consideration for contract rights for which it has already paid in full the consideration demanded and agreed upon by the State at the time the contract was entered into; by virtue of which the plaintiff in error became vested with the right "to do business" in the State of Colorado; and upon the faith of which it invested a large amount of its capital stock in real

property in said State, personal property for the equipment of its enterprise in that State and expenses for carrying on its business therein.

(2) This prohibition of the Federal Constitution is also violated by the same Act, and by the judgment and decree aforesaid upholding the constitutionality and validity of said Act, whereby the plaintiff in error is deprived of any and all remedy or remedies for the enforcement and protection of said contract, and any and all other contracts which may be entered into by or with it for the furtherance of the enterprise which it is entitled to prosecute in the State of Colorado under its initial contract with said State itself. The discussion of this "(2)" proposition is identical with, and therefore will be referred to, a later specification, under which will be discussed the denial of "due process of law," and of the "equal protection of the laws."

At the outset of the (1) proposition it seems advisable to exactly define and limit the contention upon which the plaintiff in error, upon this point, relies. We do not contend that the contract with the State of Colorado, by which the plaintiff in error obtained the right *to do business* in the State of Colorado, exempts the plaintiff in error from any legitimate tax or imposition which the State of Colorado was entitled to impose upon *property*, real, personal or mixed, tangible or intangible, and whether by a direct revenue tax or by an occupation tax which the State of Colorado was authorized by law to impose upon its own citizens or other persons owning property or doing business in that State. We do not claim for plaintiff in error any *exemption* from taxation which the State of Colorado was entitled to im-

pose upon any parties, personal or corporate, within her borders. Our sole contention is that, having, by the initial contract, conferred upon the plaintiff in error the right "to do business" within her borders, and having fixed and received the consideration agreed upon by that contract, said State cannot now violate, impair or alter said contract to the extent of demanding and collecting a new and additional consideration and compensation for a right already granted and paid for.

Neither does the plaintiff in error deny that, in the first instance, it was within the right and power of the State of Colorado to either withhold from foreign corporations altogether the right and privilege to do business within her borders; or, if she chose to admit them, to charge any price she might choose to fix for the granting of that right and privilege. The law seems to be that the State of Colorado, arbitrarily and at her own election, might exclude foreign corporations altogether; or, if she chose to admit them, might arbitrarily charge whatever price or consideration she pleased for the granting of such right. The State of Colorado exercised her election in this matter and determined to grant to foreign corporations the right to do business within her borders upon the payment of a consideration which she arbitrarily fixed and which foreign corporations desiring to operate in this State were compelled to pay, or to remain outside. Determined by the standard fixed by the State of Colorado, the price, which the plaintiff in error was required to pay for "the right to do business" in said State, was fixed by the Colorado statutes, existing at the time the contract was made, at the sum of $15,000. It

was within the right and power of said State to have fixed this price at any sum she chose, whether fifteen cents or fifteen million dollars, or less or more than either. When the plaintiff in error took under consideration the question of doing business in the State of Colorado, it naturally and necessarily took into consideration and gave controlling influence to the question of whether it could afford, or was willing to pay the price then placed upon that right and privilege. After due consideration the plaintiff in error determined that it would pay the price then demanded. It is evident that it considered the right worth $15,000, from the fact that it was willing to, *and did*, pay that amount therefor: But it cannot be said that, had the price been then fixed—as the Act under consideration attempts to do,—at the price of $95,000 ($15,000 cash and $4,000 annually for twenty years), the plaintiff in error would not have hesitated to enter into the contract; more than probable it would have considered that the privilege and right to do business in the State of Colorado was not worth any such amount. At any rate, when the agreed consideration of $15,000 was paid for the contract right and the contract fully executed by one party thereto (the plaintiff in error), any law, judgment or decree which subsequently required the payment of an additional consideration of $80,000, or any other amount, for the same contract right, is clearly in violation of the prohibitions contained in the Constitution of the United States.

Section 65 of the Act provides:

> "Every foreign corporation" (which includes the plaintiff in error), "which has

heretofore obtained * * * the right and privilege to transact and carry on business within the limits of the State of Colorado, shall, in addition to the fees and taxes now provided for by law, as a condition precedent to its right to do any business within the limits of this State, pay, annually * * * four cents upon each one thousand dollars of its capital stock."

And Sec. 66 of said Act provides that:

"Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this State, until such tax is paid."

These provisions of said Act violate both the Federal Constitution and the Constitution of the State of Colorado.

Paragraph 1 of Sec. X of Art. 1 of the Federal Constitution provides:

"1. No State shall * * * pass any bill of attainder, *ex post facto* law, or law

impairing the obligation of contracts or grant any title of nobility."

This provision of the Federal Constitution is reproduced in the Colorado Constitution, (Sec. 11 of Art. II), which is as follows:

> "That no *ex post facto* law, nor law impairing the obligation of contracts, or retrospective in its operation, * * * shall be passed by the general assembly."

Prior to the passage of this Act of March 22, 1902, the State of Colorado had entered into a contract with the appellant as shown by the allegations of the complaint, the evidence introduced at the trial, and the Colorado corporation laws applicable to the facts and conditions of this particular case. See "Statement of the Case," *supra*.

The pleadings and the evidence herein show that on and prior to May, 1901, the appellant had complied with all the then existing laws of the State of Colorado; and by virtue of such compliance it had become permitted, authorized and empowered to own property and do business in the State of Colorado, and to carry out, in said State and under the laws thereof, all the purposes of its creation as stated in its charter of incorporation. Under said laws, and as a condition precedent to such authority to the appellant to do business in this State, it paid for that privilege the sum of $15,042.50, being a fee based upon its entire capitalization.

This was "a consideration," *charged by the State and paid by the plaintiff in error to the State*, for the privilege of *doing business* in Colorado. The

statute at that time did not provide for any further consideration to be paid for the privilege aforesaid. No agreement was made nor right reserved for subsequently charging of an additional consideration payable annually or otherwise. There was no statute at that time providing for the payment of an annual license tax, nor did the statutes put any limitation upon the privilege of carrying on, in the State of Colorado, the business for which said corporation was organized, as shown by its articles of incorporation;—except a limitation as to time, as to which the Supreme Court of Colorado has recently held that the period for which a foreign corporation has *the right to do business* in this State—whatever the life of that corporation under the laws of the State of its origin,—is limited to the statutory life of corporations created under the laws of Colorado, to-wit: twenty years.

Iron Silver M. Co. v. Cowie, 31 Colo. 450.

The plaintiff in error, by such payment and compliance with existing law, obtained the right, by grant from the State, made for valuable consideration, to do business in this State for a period of twenty years; subject, of course, to the ordinary rules as to taxation of its *property* equally with that of any other person within the jurisdiction of the State. The right, so granted, cannot be taken away by the imposition of a subsequent additional burden, *as a condition* to the "doing of business" in this State. Relying upon the grant made to it under the laws of the State, and for which it had paid the sum of $15,000, it invests capital, acquires property, establishes a business, and has definite

vested rights which cannot thereafter be taken away by the imposition of new conditions.

Commissioners v. Colo. Seminary, 12 Colo. 497, 499.

"The obligation of the contract, implied in the grant of a corporate charter will be impaired by a law, passed subsequent to the acceptance of the charter, annulling the corporation, that is, taking its charter life; taking away any of the franchises conferred by the charter; *imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights;* or imposing additional burdens on corporate stockholders either as to business before or afterwards transacted."

15 A. M. & Eng. Ency. Law. (2nd. Ed.) p. 1049.

"An act of incorporation, authorizing the building of a toll bridge across a navigable river, 'with two suitable draws which shall be at least thirty feet wide,' constitutes, when accepted, a contract between the Commonwealth and the corporation, which cannot be affected by a subsequent act, requiring the corporation to maintain draws of a greater width."

Commonwealth v. Proprietors of New Bedford Bridge, 2 Gray, 339.

Washington Bridge Co. v. State, 18 Conn. 53.

Monongahela Nav. Co. v. Coon., 6 Pa. St. 379.

"The laws, which exist at the time of the making a contract and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. The *remedy*, or means of enforcing a contract, is a part of that 'obligation' of a contract, which the Constitution protects against being impaired by any law passed by a State."

Walker v. Whitehead, 16 Wall. 314.

"The obligation of a contract depends upon its terms and the means which the law, *in existence at the time*, affords for its enforcement. A law, which alters the terms of a contract by imposing new conditions or dispensing with those expressed, is a law which impairs its obligations."

State Tax on Foreign-held Bonds, 15 Wall. 300, 320.

"Corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of

> the Constitution which ordains that no State shall pass any law impairing the obligation of contracts."
>
> *Miller v. The State*, 15 Wall. 478, 488.

It is a matter frequently suggested in decision and discussion, that the right of a foreign corporation to do business in a State other than that of its origin, is a mere matter of "comity." That is perhaps true when no consideration is charged for the privilege, and it is exercised and enjoyed by the mere acquiescence and *tacit* permission of the State: But it ceases to be a mere matter of *comity* when made a matter of express statute and becomes a matter of *contract* when a consideration was demanded and received for extending to foreign corporations the "right to do business" within this State. That is not enjoyed by "comity" which is conferred by statute and *paid for* at a high price.

The reasoning of the Supreme Court of the United States in the case of *Gordon v. Appeal Tax Court*, 3 How. 133, illustrates the effect of the payment of a consideration for the privilege of doing business or of being a corporation. While in that case there were two elements, one the payment of a *bonus*, and the other the agreement of an exemption from certain taxes, yet the argument on the two parts of the proposition are separate. The banks in that case upon their organization paid a *bonus* for their franchises. The Court said (pp. 145-6):

> "A round sum, or an annual charge, with or without reference to capital stock, may be asked by a legislature for such a

franchise. It may be more convenient to the banks to have such a consideration or *bonus* distributed through the years of their corporate existence, than to pay its equivalent in advance. This option was given to the old banks. Being so given, it is conclusive that the legislature intended the annual tax or charge upon the capital stocks of the banks to be the *bonus* or price, or part of the price as to some of them, that they were to pay for the prolongation of their franchise of banking. When the banks accepted the acts, by choosing to pay the annual charge instead of the stipulated alternative, it is plain that they thought so too, and that they understood in that way *the contract* between themselves and the State. Either was a condition, to be accepted and complied with before the charters were to be extended. Such a contract is a limitation upon the taxing power of the legislature making it, and upon succeeding legislatures, to impose any further tax *upon the franchise*. But why, when bought, as it becomes property, may it not be taxed as land is taxed which has been bought from the State?—was repeatedly asked in the course of the argument. The reason is, that everyone buys land, subject, in his own apprehension, to the great law of necessity that we must contribute from it and all of our property something to maintain the State. But a *franchise* for banking, when bought, the price is paid for the use of the privilege

whilst it lasts, and *any tax* upon it would substantially be *an addition to the price*."

Whether the tax (?) assessed by the revenue law of 1902, "in addition to all other fees and taxes," shall be considered as a tax upon franchises or a tax upon other property, its payment is, by the letter of the law, made a condition to the continuing "to do business;" it is therefore a distinct imposition of an additional burden upon the "right to do business," which right to do business was "bought" and paid for at the time the corporation was admitted to the State; and, at the time that payment was made, the only limitation was that the period, for which the right was granted, was to be limited to twenty years. To charge now an additional sum for the right, already paid for, to do business in Colorado, would certainly impair the contract which the State made when it accepted a specified and valuable consideration for the right which it granted.

The point is discussed in the case of *Wendover v. City of Lexington*, 15 B. Monroe, 258, 264, where the court, after quoting the *Gordon case* above mentioned, says:

> "It is decided in that case that a franchise is not taxable as such, if a price has been paid for it which the legislature accepted. And that is our own opinion. If at the time of the grant of a franchise, a price is stipulated and paid for it, there is an agreement or contract made which the legislature thereafter would have no right to impair, for she is expressly prohibited by

the constitution from passing any law impairing the obligation of contracts."

The proposition is very clearly expressed in the discussion contained in the case of *Attorney General v. Bank of Charlotte*, 4 Jones' Equity, (N. C.) 287, 293. That case was almost on all fours with the case now under discussion, and the court says:

> "It is now universally conceded that a grant by the Legislature of a charter, whereby a banking corporation is created, is a contract between the State and the corporation, which the Constitution of the United States prohibits the State from violating. The well known definition of a contract is, that it is an agreement between two or more persons, upon a sufficient consideration, to do, or not to do some particular thing. An analysis of it will show that it consists of four essential parts, to-wit, the parties, the agreement express or implied, the *consideration*, and the thing to be done or omitted. Of these, the consideration is as important as any other, *and cannot be varied by either party without the consent of the other;* and an attempt to do so by either party without such consent, would be a violation of the contract, as effectually as would be the breach of it in any other particular. The legislature has the undoubted right to grant to a number of individuals the franchise of being a corporation, for the purpose of banking or for any other useful purpose.

If the grant be mainly for the benefit of the corporators themselves, the State may demand a price for the franchise, to be paid at once, in a round sum, or annually, during the existence of the corporation, by way of impost or tax. Where the grant of the charter is tendered by the State, and accepted by the individual persons to whom it is offered, then, the corporation springs into existence, and at the same moment a contract arises between it and the State, which is protected by the Constitution of the United States. If the price or consideration of this contract is stated, in express terms, to be a certain sum, *and no more*, there can be no doubt that the State would be prohibited by the Constitution of the United States from demanding anything more for the corporate franchise. Can it make any difference in principle whether words excluding any addition to the price be used or not? When a person says that he will take one thousand dollars for a tract of land, does he not necessarily mean that he will take that sum, and that he will not ask any more, and, if the offer is accepted, can he demand any more? No one can hesitate as to the proper answer to be given to this question; and the purchase of a franchise from the State, when viewed in the light of an executed contract, is precisely analagous. And accordingly, the Supreme Court of the United States held, in the case of *Gordon v. Appeal Tax Court*, cited by the defendant's

counsel, that a stipulated price for the extension by the legislature, of a bank charter, without any words of restriction or limitation being used, did exhaust the power of taxation on the franchise during the period of the extension. * * * A franchise, unlike land or a personal chattel, has no existence until it is called into being by the act of the legislature or sovereign power of the State, and in the very act of granting it to a corporation, created for the very purpose of taking it, a contract is formed between the State and the corporation. An essential part of this contract is, as we have already shown, the consideration or price, paid or agreed to be paid, for the franchise, and that neither party is at liberty to vary without the consent of the other. And this prohibition must continue *during the existence of the franchise*, because the contract including the consideration, is an essential part of it and must be co-existent with it."

Every line of this reasoning applies to the case at bar. The plaintiff in error could not come into Colorado and do business, except upon *paying a consideration*. It paid a cash consideration in the lump sum of $15,000; and under existing law, that payment gave it the *privilege and right to do business* in Colorado for a period of twenty years. The proposition was made by the State; was accepted by the plaintiff in error; the price was paid; the contract was executed; the plaintiff in error entered into busi-

ness there upon faith of the contract; acquired property and incurred large expenses under it; *and that* contract cannot now be varied or impaired by the State, in violation of the constitutional prohibitions.

This is an entirely distinct proposition from the question of revenue taxes based upon property values for the general support of the government. As to such taxes, of course, the uniformity rule applies, and every person must bear his proportionate share, *but only such share*, of the general burden. But as its purpose and effect is to exact a price or consideration for the right *to do business*, this legislation is an attempt to alter and impair an existing contract by charging a second time for a thing that has been already once paid for, at the full price mutually agreed upon by the parties to the bargain; it is, therefore, in violation of the obligation of contract, and as such it is void.

The constitutional reserved power as to corporations will not support this legislation. This reserved power is expressed in the Colorado Constitution thus:

> "The General Assembly shall have the power to alter, revoke or annul any charter of incorporation now existing and revokable at the adoption of this Constitution, or any that may hereafter be created, *whenever, in their opinion it may be injurious to the citizens of the State*, in such manner, however, *that no injustice shall be done to the corporators.*"
>
> Constitution of Colorado, Article XV, Sec. 3.

Admitting for the sake of argument only, that this constitutional provision would reach foreign corporations and involve a reserved power to revoke or annul a privilege to do business granted to such foreign corporation by Colorado laws,—yet, we respectfully submit, that it would not apply to a case where the privilege had been *bought and paid for*. In such a case, even under this reversed power, the right, which had thus been bought and paid for, could be taken away only for some breach on the part of the grantee of its duties or obligations under the grant, *e. g.*, an abuse of its corporate privileges; and this would of course, have to be established by some judicial proceeding showing a misuser whereby it had forfeited the right which had been granted to it. The State having made a contract, for a valuable consideration, cannot repudiate its contract arbitrarily under any such reserved power.

But it must be noted that this reserved power is expressly limited. It is only when the continued existence of the charter, or the continued transaction of the corporate business, is, in the opinion of the legislature, "*injurious to the citizens of the State*" that the reserved power could be exercised. And there can be no pretense that that is a ground for the action in this case.

There is a further limitation, also, that, when there is any such revocation or annulling of the grant, it must be done in such a way that "*no injustice shall be done to the corporators.*" But can an additional compensation for a privilege, already paid for at an agreed price, be imposed without injustice? Does it not come under the same principles as the case of a sale of land, as suggested in the

North Carolina decision, in a case above quoted? The sale is made for an agreed price. The offer is accepted, the price paid, possession is given. Would it not be an injustice, through arbitrary power, to demand an additional price for the same privilege,—for the same interest,—previously conveyed?

In *Miller v. State*, 15 Wall, 478, 497-8, the U. S. Supreme Court said:

> "So where the legislature in granting a charter to an insurance company reserved the right to alter it. * * * Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which, by a legitimate use of the powers granted, have become vested in the corporation, etc."

In *Coast Line R. Co. v. Savannah*, 30 Fed. 646, the court said (649-50):

> "In construing this contract, it is the necessary presumption that the railroad company agreed, in consideration of the privileges granted it by the city, to pave between its tracks and no more; and this obligation is as binding on the city as it is on the company. Therefore a subsequent act of the legislature, requiring it to pave a lateral addition of six feet bears on the contract to the advantage of the city and to

the injury of the company, and impairs the obligation."

"It remains to be determined whether the act of the State legislature and the city ordinance in pursuance thereof, are valid. Fortunately for the proper adjudication of this most interesting question; the reports of the highest appellate tribunal of our country, a tribunal at once renowned for the majesty of its jurisdiction, the enlarged and splendid comprehensiveness of its knowledge, and the perspicuous lucidness of statement with which its decisions are pronounced, abound in cases upon the provision of the constitution by which the validity of this act must be tested. The power of the State to repeal, suspend, alter or modify a charter is fully conceded in repeated decisions. Every possible presumption is in favor of the validity of the statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger; but neither the State nor the United States can interfere with private rights, except for legitimate governmental purposes; and it is not legitimate for any purpose for a State to pass any law impairing the obligation of a contract. The reservation of the State to withdraw the franchise of this railroad cannot be disputed, and that reservation affects the entire relation between the State and the corporation, and places under legislative

> control all rights, privileges and immunities 'derived by its charter direct from the State.' 15 Wall. 458. But rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing. 96 U. S. 511. It is competent for the State, in the exercise of its reserved power, * * * to alter the act incorporating the company in all particulars constituting the grant to it of corporate rights, privileges and immunities. These flow from the State, and should properly be kept under its control. But where the corporation has, by contract or otherwise, acquired vested rights, it is not competent for the legislature to take them away. The State cannot undo what has already been done. It cannot unmake contracts that have already been made. All such rights of the corporation, legally acquired, are equally beyond legislative interferences. (Citations.)"

Erie R. R. Co. v. Penna., 153 U. S. 628, is a case quite similar in principle to the one at bar, and pertinent and persuasive; but to avoid quite a lengthy quotation, we beg to adopt by reference as a part of this brief, that portion of the court's opinion beginning with the last paragraph on page 642, and ending with page 644.

It seems to us that upon questions of this character, there can be no controversy, and that whatever view may be taken of the other contentions presented to this Court, the sections of the Act of

March 22, 1902, above quoted, are void for the reason that their effect is to "impair the obligation of a contract," and thus to conflict with Art. I, Sec. 10, of the Federal Constitution.

For an intelligent, correct and just determination of this controversy, it is of the utmost importance to clearly understand and constantly bear in mind what is the exact thing granted,—the exact right or privilege contracted for by and between the State of Colorado and the plaintiff in error, authorizing the latter, as a foreign corporation, to do business in said State.

A corporation, being an artificial person created and brought into being by statute, it can only be created and exist by virtue of express law. *To be a corporation* is not a natural right, and as the right can only exist pursuant to express grant, or a law having the legal effect of a grant, the law-making power of the jurisdiction in which the creation or existence of a corporation is sought, has absolute and arbitrary control over the method by which the corporation shall come into existence, and over the price which shall be charged for that privilege. The authoritities are numerous to the effect that two initial privileges or powers—called franchises by the authorities—are essential to the creation and existence of a corporation, to-wit: 1. The franchise "to be a corporation;" and, 2, the franchise "to do business as a corporation" in the State or jurisdiction creating the corporation

In the case of a domestic corporation these two franchises are granted simultaneously, and the price charged therefor covers both franchises: Both to-

gether might, then, be considerd as being, for all intents and purposes, one and the same.

When, however, a corporation, created by one State, seeks to do business in another State, these two franchises are necessarily separated. The second State can charge the foreign corporation nothing for the franchise "to be a corporation;" for that franchise is already possessed by the corporation under the law of the State of its creation. But that law does not and cannot authorize the person or creature, which it has brought into existence, to do business in another State; consequently, its grant of such franchise to the corporation is limited by the boundaries of the parent State. When, therefore, such a corporation desires to do business in another State, it must obtain from the latter a franchise "to do business as a corporation" therein; and must pay therefor whatever price the second State chooses to demand for such privilege.

It is thus apparent that what the plaintiff in error contracted for with the State of Colorado, and paid for to the State of Colorado at the price of $15,000.00, was and is the right *to do business as a corporation* in that State. This is clearly recognized in the opinion of the Colorado Supreme Court deciding the case at bar. It is there said (Rec., p. 60):

> "The fee paid to the secretary of state for the use of the state when the certificate is filed is not, in any sense, a tax. It is a conventional price, or bonus, which the corporation pays to the state for the privilege of entering this state to do business as a corporation, subject to all legiti-

> mate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights, and upon the use of the privileges thus purchased. The right or privilege *to be* a corporation is a franchise itself, often called a primary franchise; and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the State of New Jersey, yet it was for the right to come into this state, and do business, as a corporation, that the bonus was exacted. The secondary franchise or right of making use of the purchased privilege, which the books denominate the franchise *to do*, is entirely distinct and separate from the franchise *to be* or to exist here as a corporation."

And later on (Rec., p. 60, fol. 131), the Colorado Supreme Court says:

> "We have already held that this filing fee was the conventional price for appellant's right of entrance, as a corporation, and when paid merely entitles it to come into this state *to do business as a corporation*, etc."

Thus it appears from the language of the Colorado Supreme Court itself, that the right or thing for which the plaintiff in error paid the sum of $15,000.00, "for the use of the state" of Colorado, was the right *to do business as a corporation* in the State of Colorado.

The provisions of the Act of March 22, 1902, repeatedly quoted above, clearly demands, and proposes to collect, another "bonus or price" for the same identical thing, to-wit, the right to do business in the State of Colorado. This statute does not purport to impose a tax upon *the* smelting and refining business, or upon any other particular business. It does not at all purport to tax *a* business. It expressly places the imposition upon the right *to do business as a corporation* and provides for a forfeiture of that right upon the refusal or failure of the plaintiff in error to pay the additional price demanded for a continued enjoyment of the right to do business as a corporation in the State of Colorado—a right which, as already repeatedly pointed out, had previously become vested in the plaintiff in error by virtue of an express grant, an executed contract, made for a valuable consideration mutually agreed upon by and between the parties, and paid by the plaintiff in error.

There is not the slightest difference in character between the imposition made upon the plaintiff in error by the Colorado statute under which the plaintiff in error paid to the Secretary of State, for the use of the State, the sum of $15,000.00 for the right to do business in the State of Colorado, and the imposition attempted by the aforesaid provisions of the Act of March 22, 1902. If the first was not a tax, then the second is not a tax. If the first was a mere bonus or conventional price or fee, then so is the second.

As the statutes existing at the time a contract is made, enter into and become a part of that contract,

it is undoubtedly true that foreign corporations coming into the State *after* the enactment and approval of the Act of 1902, must pay not only the initial charge, bonus or conventional price required by the previous Colorado statutes, but also the additional price in annual installments provided for by said Act. But where a corporation came, as did the plaintiff in error, into the State and acquired and paid for the contract right to do business therein, prior to the Act of 1902, and at a time when the sole and only charge or price fixed and demanded by the State, was the sum of $15,000.00, such a corporation cannot be required to pay an additional price for the same thing, even though the State of Colorado subsequently increased the price which it would demand for a similar commodity in all future sales thereof.

Specifications II & IV.

Due Process of Law.

Sec. 66 of the Act, under consideration, provides that—

> "Every corporation which shall have failed to pay the tax provided for * * * shall by reason of such failure *forfeit* its right to do business within the limits of this State until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, etc."

By reason of this provision, we contend that said Act is invalid and void. It violates the pro-

visions of the Colorado Constitution and the Federal Constitution respectively.

The Federal Constitution, in the 5th Amendment, declares:

> "No person shall * * * be deprived of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And the 14th Amendment of the same instrument provides:

> "1. No State shall * * * deprive any person of life, liberty or property, without due process of law."

This constitutional prohibition is embodied in Colorado's Constitution; (Art. 2, Sec. 25).

That the rights and privileges which the plaintiff in error enjoys under its charter of incorporation, and which, at the time of its coming into Colorado, that State by statute agreed and guaranteed that it should enjoy in said State upon payment of the consideration fixed by law, and its compliance with the other provisions of the Colorado law, are *property* within the meaning of these constitutional provisions, is too well settled to require argument or citation of authority. The effect of the statute under consideration is in two respects to deprive the plaintiff in error of its property without due process of law, to-wit:

First. It deprives the plaintiff in error of the right and opportunity to protect itself against the State by appeal to the courts and to "due process of law." Upon its failure to pay the exaction thus arbitrarily imposed upon it, no matter how unlawful, unjust or iniquitous that exaction may be, the plaintiff in error is absolutely deprived of the right to resort to the courts of the State for the purpose of testing the legality and justice of that tax; and by said statute the courts of the State are deprived of any jurisdiction of such a case the instant that it is made to appear therein that the corporate litigant has failed to pay the tax imposed.

Second. This statute absolutely deprives the plaintiff in error of the power to protect itself against unjust claims, demands and suits by other parties against it, and renders it powerless to enforce its just rights and demands against others. A more extraordinary situation cannot be imagined, nor one which is more fundamentally and outrageously at variance with every principle of law, justice, civil government, and civilization.

It is now well settled that a corporation is a "person" within the meaning of the constitutional provisions last above quoted. It is also well established that these constitutional prohibitions reach the unlawful imposition of illegal taxes.

This question, with several other kindred ones, was very elaborately and ably discussed by Mr. Justice Field and Sawyer J. in *County of Santa Clara v. So. Pac. R. Co.*, 18 Fed. 385, in the course of which case the former said:

(p. 397) "The first section of the Fourteenth

Amendment places a limit upon all the powers of the State, including, among others, that of taxation. After stating that all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State in which they reside, it declares that 'no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person (dropping the designation 'citizen') of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.' The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States throughout the broad domain of the republic."

(p. 398) "With the adoption of the amendment the power of the States to oppress any one under any pretense or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to every one in his private rights—in his right to life,

to liberty, to property and to the pursuit of happiness. It implies not only that the means which the laws afford for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. * * * "

(p. 399) "Unequal taxation, so far as it can be prevented, is, therefore, with other unequal burdens, prohibited by the amendment. There undoubtedly are, and always will be, more or less inequalities in the operation of all general legislation arising from the different conditions of persons from their means, business, or position in life, against which no foresight can guard. But this is a very different thing, both in purpose and in effect, from a carefully devised scheme to produce such inequality; or a scheme, if not so devised, necessarily producing that result."

(p. 400) " * * * That amendment requires that exactions upon property for the public shall be levied according to some common ratio to its value, so that each owner may contribute *only his just proportion* to the general fund. When such exaction is made without reference to a common ratio, it is not a tax, whatever else it may be termed; it is rather a forced contribution, amounting, in fact, to simple confiscation."

(p. 403) " * * * It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being, that is called a corporation, cannot feel either. So, therefore, whenever a provision of the constitution or of a law guarantees to persons protection in their property, or affords to them the means for their protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations."

(p. 404) "The Fifth Amendment to the Constitution declares that no person shall 'be deprived of life, liberty, or property without due process of law.' This is a limitation upon the federal government similar to that which exists in the constitutions of several of the States against their own legislative bodies; and the term 'person' thus used has always been held, either by tacit assent or express adjudication, whenever the question has arisen, to extend, so far as property is concerned, to corporations, because to protect them from spoliation is to protect the corporators also.

"Now, the Fourteenth Amendment extends in this respect the same prohibition to the States that the Fifth Amendment did to the federal government: 'Nor shall any State deprive any person of life, liberty, or property without due process of law;' and it adds to the inhibition, 'nor deny to any per-

son within its jurisdiction the equal protection of the laws.' By every canon of construction known to the jurisprudence of the country, the same meaning must be given to the term 'person' in the latter provisions as the former. Surely these great constitutional provisions, which have been, not inaptly, termed a new Magna Charta, cannot be made to read as counsel contend, 'nor shall any State deprive any person of life, liberty or property without due process of law, *unless he be associated with others in a corporation*, nor deny to any person within its jurisdiction the equal protection of the laws, *unless he be a member of a corporation*.' How petty and narrow would provisions thus limited appear in the fundamental law of a great people!

"The constitutional guaranties of due process of law, and of equality before the law, would be dwarfed into comparative insignificance, and almost emasculated of their protective force, if restricted in their meaning and operation as contended by counsel. A large proportion of our people are members of some corporation,—religious, educational, scientific, trading, manufacturing or commercial,—and the amount of property held by them embraces the greater part of the wealth of the country."

(p. 406) "The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are

created by the State, so frequently and positively affirmed by counsel, has no foundation whatever in the law of the country. By the decision of the Supreme court of the United States in the *Dartmouth College Case* it was settled, after great consideration, that the charter of a corporation, under which its franchise,—its capacity to do business and hold property,—is conferred, is a contract between the corporators and the State, and therefore within the protection of the federal constitution prohibiting legislation impairing the obligation of contracts. So far from the State having unlimited control over the franchises and property of corporations, because of its paternity to them, it has under that decision only such as it possesses over the contracts and property of individuals. It cannot, from that fact alone, alter, lessen, or revoke their franchises, although they be a free gift. It cannot, from that fact alone, interfere with or impose any burdens upon their property, except as it can interfere with and impose burdens upon the property of individuals.

" * * * To avoid that limitation upon their power, most of the States, in charters since granted, have reserved a right to repeal, amend, or alter them, or have inserted in their constitution clauses reserving a right to their legislatures to repeal, alter or amend the charters, or to repeal, alter or amend general laws under which corporations are permitted to be

formed. This reservation, in whatever form expressed, *applies only to the contract of incorporation*, without which it would be beyond revocation or change by the State. It removes any impediment, which would otherwise exist, to legislation affecting that contract. * * * It accomplishes nothing more; therefore, the legislation authorized by it must relate to *the contract embodied in the charter*, amending, altering or abrogating its provisions. Legislation touching any other subject is not affected by it,—neither authorized nor forbidden. Its whole scope and purpose is to enable the State to pass laws with respect to the charter,—the contract of incorporation,—which would otherwise be in conflict with the prohibition of the federal constitution. Legislation dealing with the corporation in any other particular must, therefore, depend for its validity upon the same conditions which determine the validity of like legislation affecting natural persons."

The exaction sought to be imposed in the above case was held in violation of the constitutional provisions last above quoted.

Denial of the Due Administration of Justice.

The Act which we are discussing provides (Sec. 66) that when a corporation shall fail to pay the tax provided for,

"such failure may be pleaded and maintained as an absolute defense to any and all actions,

> suits or proceedings in law or in equity, brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this State until such tax is paid."

By this provision, the Colorado legislature attempts to deprive any corporation, which fails to submit without protest to this exaction, of all resort to, or protection by, the Colorado courts, whether State or federal. It denies to such corporation the right to submit the justice of its cause to the courts, whether it be plaintiff or defendant. In this respect the Act is in direct violation of the following constitutional provision, to-wit:

The Fourteenth Amendment of the Federal Constitution, which, in paragraph 1, provides:

> "No State shall * * * deny any person within its jurisdiction the equal protection of the laws."

And Sec. 6, Article II, of the Colorado Constitution, which provides:

> "That courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and that right and justice should be administered without sale, denial or delay."

The answer, that will undoubtedly be made to this contention,—as it is the only answer which would be even plausible,—will be that this Act does

not deprive the corporations affected of any *right*, but only takes away the *remedy*, by which said right is to be enforced or protected; and that the power of the State over *remedies* is unlimited. We submit, however, that such is not the law, and that, whatever may be the power of the law-making department of the government over *remedies*, that power is undoubtedly subject to the limitation that there *must always be provided an adequate, appropriate and reasonably prompt remedy* for the enforcement and protection of every right.

> "The obligation of a contract consists of the duty imposed by the law on the parties to perform their agreement."
>
> *15 Am. & Eng. Ency. Law*, (2nd Ed.) 1040.
>
> *Sturges v. Crowninshield*, 4 Wheat. 122, 197.
>
> *Green v. Biddle*, 8 *id.* 1, 75-6.
>
> *Ogden v. Saunders*, 12 *id.* 213, 256-7.
>
> *Bronson v. Kinzie*, 1 How. 311, 315 *et seq.*
>
> *McCracken v. Hayward*, 2 How. 608, 612.
>
> *Edwards v. Kearzie*, 96 U. S. 595, 600.
>
> *Lapsley v. Brashears*, 4 Litt. (Ky.) 46, 54.

> "This obligation the law enforces through its remedies."
>
> *15 Am. & Eng. Ency. of Law*, (2nd Ed.) 1040.

The *validity*, *construction* and *remedy* are part of the obligation.

Green v. Biddle, *supra*.
Ogden v. Saunders, *supra*.
Bronson v. Kinzie, *supra*.
McCracken v. Hayward, *supra*.
Von Hoffman v. Quincy, 4 Wall. 535, 550, *et seq*.
People v. Bond, 10 Cal. 563, 570.
Story v. Furman, 25 N. Y. 214, 223.
Walker v. Whitehead, 16 Wall. 314, 317-18.

The legislature may modify, but cannot take away all remedy from a contract.

Bruce v. Schuyler, 4 Gilm. (Ill.) 221, 277.
Wood v. Child, 20 Ill. 209, 211.
Templeton v. Horn, 82 Ill. 491.

In *I Cooley on Taxation*, (3rd Ed.) 128, it is said:

> "The remedy for the enforcement of a contract is a necessary part of it, without which it could have no legal obligation whatever. But there is, and can be, nothing unchangeable in remedies, and the State must be left at liberty to change them at discretion. In the recognition of this right, however, it is always assumed that no change will be made which will leave a party without a remedy, for the enforcement of his contract, substantially equal to and as efficient and valuable as that the law entitled him to claim when his contract was made.

If the remedy is wholly, in some distinct and important part, taken away, or is hampered with conditions or restrictions, or otherwise seriously impaired in value, the obligation of the contract is impaired in this particular."

Von Hoffman v. Quincy, 4 Wall. 535, 550, *et seq.*

Tennessee v. Sneed, 96 U. S. 69, 74.

Poindexter v. Greenhow, 114 U. S. 270, 304.

In *Cooley's Const. Lim., (6th Ed.)*, 350, it is said:

"A law which deprives a party of all legal remedy must necessarily be void. 'If the legislature of any State were to undertake to make a law preventing the legal remedy upon a contract lawfully made and binding on the party to it, there is no question that such legislature would, by such act, exceed its legitimate powers. Such an act must necessarily impair the obligation of a contract, within the meaning of the constitution.'"

Call v. Hagger, 8 Mass. 423, 430.

Osborne v. Nicholson, 13 Wall. 654, 662.

U. S. v. Conway, Hempst. 313.

Johnson v. Bond, *id.* 533.

West v. Sanson, et al., 44 Ga. 295.

Penrose v. Erie Canal Co., 56 Pa. St. 46, 48.

Thompson v. Commonwealth, 81 *id.* 314, 323.

Impairing the validity of a contract includes acts taking away remedies upon contract.

Von Hoffman v. Quincy, 4 Wall. 535, 552.
Antoni v. Greenhow, 107 U. S. 769, 774.
White v. Same, 114 U. S. 307.
Poindexter v. Same, *ib.* 270, 303.
Chaffin v. Taylor, *ib.* 309.
Allen v. B. & O. R. Co., 114 U. S. 311.
Rahway v. Munday, 44 N. J. L. 395, 415.
Morton v. Comptroller Genl., 4 S. C. 430, 449.
Tracy v. Reed, 38 Fed. 69, 75.
Collins v. Collins, 79 Ky. 88, 89.
Seibert v. Lewis, 122 U. S. 284, 294.
Moore v. Greenhow, 114 U. S. 338.

In *Oatman v. Bond*, 15 Wis. 22, the Court, after stating at pp. 28-29 that:

> "It is within the power of the legislature to repeal, change, or modify the laws governing the proceedings in courts of justice, as well as to past as future contracts, so that parties have a substantial remedy, according to the cause of justice at the time the contract was made,"

held the statute there under consideration to be invalid on the express ground that it did not leave the parties any such remedy, but showed

"upon its very face an intention to clog, hamper and embarrass the proceedings to enforce the remedy, so as to destroy it entirely, and thus impair the contract, so far as it is in the power of the legislature to do so."

Adding as a further ground:

"no one would contend in view of the provision in our Bill of Rights, which declares that 'every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character,' that an act taking away *all remedies* for enforcing contracts would be a valid enactment."

In *McCracken v. Hayward*, 2 How. 608, is is said at p. 612:

"The obligation of a contract 'consists in its binding force on the party who makes it.' *This depends on the laws in existence when it was made*, these are necessarily referred to in all contracts, and forming a part of them, as the measure of the obligation to perform them, by one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a

right to enforce the performance, by the remedies then in force. If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

Sturgis v. Crowninshield, *supra*.
Ogden v. Saunders, *supra*.
Robinson v. Magee, 9 Cal. 81, 84.
Smith v. Cleveland, 17 Wis. 573.

In *Scarborough v. Dougan*, 10 Cal. 305, the court said:

"It is just as well settled that the legislature has no right so to regulate the remedy as that it shall destroy the contract by denying all means of enforcement. A right without a remedy is practically no obligation at all. A contract is just as much impaired by a prohibition to sue upon it as it is by direct legislative action declaring it void."

In *Patterson, Federal Restraints on State Action*, (1888), § 77, p. 181:

"The force and effect of the prohibition,"—(against impairing the obligation of contracts)—"as construed by the courts,

is that a state may not, by any law or by any act to which the state, by its enforcement thereof, gives the force of a law, deprive a party of the legal right of enforcing or obtaining compensation for the breach of, an express contract, executed or executory, between individuals, or between a state and individual; but a state may regulate or limit the remedies of the contracting parties, provided it leaves in force a substantial part of the legal remedies which subsisted at the time of making the contract."

15 Am. & Eng. Ency of Law, (2nd Ed.) 1052.

The obligee, though not entitled, as of right, to the same form of remedy as that in force when the obligation was contracted, is entitled to *some remedy;* "and that remedy must be substantially equivalent, in coercive force, to that provided by law when the obligation was contracted."

In addition to the foregoing authorities see the following:

Memphis v. U. S., 97 U. S. 293.
Lockett v. Usry, 28 Ga. 345.
Bruce v. Schuyler, 9 Ill. 221-5.
Fullerton v. U. S. Bank, 1 Peters, 604, 614-15.
Walker v. Whitehead, 16 Wall. 314, 317.

In *15 Am. & Eng. Ency. of Law, (2nd Ed.)*, 1049, it is said:

> "The obligation of the contract implied in the grant of a corporate charter will be impaired by a law passed subsequent to the acceptance of the charter, * * * imposing burdens on the corporation itself as a condition to the further exercise of its corporate rights."

In *Patterson's Federal Restraints on State Action*, 152, 153, it is said:

> "A State cannot, after the making of a contract, impose as a condition precedent to its enforcement, that he who seeks to enforce a contractual right, shall prove an extrinsic and independent fact which has no necessary connection with the right to be enforced; as, for instance, that he has paid certain taxes."

In *Walker v. Whitehead*, 16 Wall. 314, it is expressly *held*, that a retrospective law, depriving a party of his right to enforce a contract when taxes have not been paid, is void.

We beg leave to refer at this point to another phase of this statute, to-wit: That it is retrospective in its operation. It does not confine its attempted denial of the due administration of justice to causes of action in favor of or against appellant which may arise *subsequent to the enactment*, but extends that denial "to any and all actions, suits and proceedings, in law or equity, brought or maintained by or on behalf of such corporation, etc." It therefore closes the doors of the courts of justice to the corporation affected, as well concerning matters of

controversy which originated prior to March 22, 1902, as those which might arise subsequent to that time.

In *State ex rel. Davison v. Gorman*, 40 Minn. 232, the question was upon the constitutionality of a statute which required the payment to the county treasurer of specified sums, prescribed with reference to an arbitrary classification of estates, by their value, and provided that "no proceedings of any kind shall be had in any cause pending in such probate court for the settlement of any estate," * * * "until such payments shall have been made."

In opposition to this statute there was set up a section of the Minnesota constitution which read as follows:

> "(Every person) ought to obtain justice freely and without purchase; completely and without denial, conformably to the laws."

The court cites cases to the effect that "the constitutional right to obtain justice freely and without purchase, which is as ancient as *Magna Charta*, has not been understood to be a right to have judicial proceedings carried on without expense to the parties," (p. 233); but takes the ground that "the sums required by this act to be paid into the county treasurer, must be regarded as *taxes*, in the ordinary sense of that word, as it is used in the constitution;" and then, after discussing the statute as offending also against the constitutional requirement of uniformity in taxation, the opinion closes thus:

> "Suitors in this * * * court, * * * should not be required to pay, as a condition to their suits being entertained, a tax measured by the value of their property, and without regard to the nature or extent of the judicial proceedings which may be invoked or become necessary. That would be contrary to that clause of the Constitution which guarantees justice freely and without purchase, completely and without denial."

That case was followed in *State v. Nelson*, 41 Minn. 25, in *Mearkle v. The County of Hennepin*, 44 Minn. 546, and in *State v. Mann*, 76 Wis. 469, 480. In the last case the court holds of a similar requirement of the Revenue Act that "it looks as if it compelled suitors to *purchase justice*."

Sec. 66 of this Colorado Act is in violation of general constitutional principles.

> "Every man is entitled to a certain remedy in the law for all wrongs against his person or his property, and cannot be compelled to buy justice or to submit to conditions not imposed upon his fellows, as a means of obtaining it."
>
> *Cooley Const. Lim. (6 Ed.)* 443, 444.

The case at bar, then, stands in the position and presents the condition following, to-wit:

The State of Colorado, having absolute and arbitrary right and power to either exclude foreign corporations altogether from her boundaries, or to

permit them to do business as corporations therein, affirmatively elected to permit them to do business as corporations therein.

Having so elected to admit foreign corporations into her territory with "the right to do business" therein, she further had the absolute and arbitrary right and power to fix the price, terms and limitations under which the foreign corporations should enjoy the privilege and right to do business as such in the State of Colorado. She required them to file their charter or articles of incorporation and sundry other documents and papers expressly named in the statute; to locate a business office in the State and file a certificate of such location; to appoint an agent in the State; to make filings of these documents, certificates and papers at designated places; to pay certain filing fees; and to pay *a cash* or lump *consideration*, ascertained and fixed by a basis or method of computation expressly and distinctly established by statute: She elected (G. L. 1883, p. 186, sec. 260) that, upon compliance with these requirements, "such corporation shall be subject to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character, organized under the general laws of this State, and shall have no other or greater powers."

The conventional price or bonus, which the State demanded and agreed to take from the plaintiff in error, at the time it came into the State and availed itself of this statutory right and privilege "to do business" in the State of Colorado, was the cash or lump sum of $15.000.00 "for the use of the state," *plus* certain filing fees which the law required to be paid to the various filing and recording officers

in whose offices the prescribed papers and documents were required to be filed.

The plaintiff in error fully complied with each and every one of these requirements, and paid in cash the bonus or price demanded and agreed upon by the State. The State of Colorado, by this method, invited, induced and *enticed* the plaintiff in error to come within the State of Colorado and invest five million dollars in real estate; inaugurate and equip a large and extensive business therein as a link in its general business, which was both interstate and international; tie up twenty per cent. of its resources and working capital in said State; and to put itself in such a position that it could not thereafter withdraw from the State without immense loss, both in property and business, and without a disastrous crippling and embarrassment of its enterprise.

As the laws and statutes of Colorado *at that time* stood, the performance by the plaintiff in error of the above requirements, and the payment of the price aforesaid, entitled it to the right to do business in said State as a corporation for the period of twenty years. No provision was made by which the State reserved the power to charge any additional consideration, price or compensation for the right to do business in this State; nor was there anything by which the plaintiff in error was informed or notified that a further or additional price would, *or could*, be demanded of it until the end of that period.

Several years after the State of Colorado had thus invited and enticed the plaintiff in error into this position from which it could not withdraw without great loss and embarrassment, and which put it in a very large degree within the power of the State of

Colorado, said State arbitrarily, and without consulting or obtaining the consent of the plaintiff in error, by the enactment and approval of the statute under consideration, demanded of the plaintiff in error, for the right, *which it had already granted to, and received full payment for from*, the plaintiff in error, an additional price or consideration of $72,000.00, payable in annual installments of $4,000.00 each; and provided that, upon the failure or refusal of the plaintiff in error to pay this new and additional price, it should forfeit and be deprived of the very right which was already vested in it, acquired by full compliance with all the terms and conditions prescribed by the State and the full payment of the agreed price. And not only was an additional price demanded of it, but the price demanded was discriminative against it as compared with Colorado domestic corporations, with which, under the section of the General Laws last above referred to, it was put on an *equal* footing.

In the case at bar, the Colorado court, in the decision here presented for review, and the judgment and decree of the Colorado *nisi prius* court which that decision affirmed, upheld the validity and constitutionality of said statute, and by a solemn judgment and decree deprived the plaintiff in error of the vested right, which it had acquired absolutely under the laws of Colorado existing prior to March 22, 1902.

The human mind can hardly conceive of a more flagrant case of the violation of the prohibitions in the Federal Constitution against "impairing the obligation of contracts," and against a "denial of due process of law," and the deprivation of "the equal protection of the law."

The Colorado Supreme Court, in its decision and judgment under review, attempts, in section 4 of its opinion, (Rec., pp. 58-9, fols. 127-8) to evade the operation and effect of the latter prohibition of the Federal Constitution by saying that, inasmuch as in the present case there was no attempt on the part of the State of Colorado, or its courts, to set up, apply or enforce, *in the present case*, the provisions of section 66 of the Act of March 22, 1902, which made the failure of the plaintiff in error to pay this exaction operate as a forfeiture of its rights to "a day in court" in this case, therefore that question was irrelevant and immaterial; and that no regard should or could be paid to section 66 of said Act in the determination of the present case. We submit that this holding was erroneous. The true test of the constitutionalty of the statute is *not* what has been *actually done*, or is being actually attempted under it, but what *may be done* under it. If these statutory provisions are constitutional and valid, then beyond all question, one immediate and necessary result of them might be, and will be, to deprive the plaintiff in error of its constitutional *right* to "due process of law" and to the "equal protection of the laws." If the statute makes such a result possible, then that statute is unconstitutional and invalid *in toto* and *ab initio;* and it would be contrary to all constitutional law, and to justice and right, to hold that the statute must be permitted to stand as a perpetual menace and danger, like the sword of Damocles, over the plaintiff in error, until such time as some litigant may choose to cut the hair which suspends it. We humbly and earnestly contend that, where

the question of the constitutionality of a statute is directly presented to the court, law, justice and the established rules of procedure require that that question should be considered and determined upon an examination of the statute *as a law*, and not made to depend upon whether or not the particular litigant, who is claiming under the statute, chooses to ignore or waive some incidental provision of that statute, upon which he might, if he chose, insist equally as upon any other provision of said statute.

It will be readily perceived that if, after having contracted with and received full payment from the plaintiff in error, for the "right to do business as a corporation" in the State of Colorado for twenty years, the State of Colorado could, as it attempts to do by the Act under consideration, require the plaintiff in error to pay an additional compensation of $4,000.00 per annum for the remaining (17 or 18) years of the contract term, then the State of Colorado might have fixed that additional price, or may hereafter do so, at any other amount—at $5,000.00, at $50,000.00 or $500,000.00 per annum. Thus it would be possible for the State to inveigle a foreign corporation into its territory, and into its power, with the understanding and contract that the full compensation to be paid for the right to do business was a specified sum, and then, after having made such a contract, and after that contract is fully performed by the incoming foreign corporation, the State might thereafter arbitrarily demand an additional compensation in a sum which would be *prohibitive*. Thus the State would be enabled to put itself in position to commit fraud and spoliation

against a foreign corporation which had accepted its invitation to come into the State: For it could retain the compensation already agreed upon *and received*, without allowing to such corporation the right contracted for, and without performing the terms and conditions of the contract, which are thereunder to be kept and performed by the State.

Equal Protection of the Laws.

Paragraph 1 of the Fourteenth Amendment further provides:

> "Nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws."

We have already pointed out that by the provisions thereof under discussion, the Act of March 22, 1902, denies to the plaintiff in error the equal protection of the laws, by depriving it altogether of "due process of law" and of the due, or any, administration of justice by or before the courts.

There is, however, still another respect in which the statutory provisions, aforesaid, come within the prohibition of the Fourteenth Amendment, to-wit: That the plaintiff in error,—for the sole reason that it is a foreign corporation and notwithstanding the fact that, after a full compliance with the Colorado statutes, it had been admitted to that State upon an equal footing with Colorado domestic corporations,—is charged *double* the amount charged against such domestic corporations for the same right and privilege. The courts have consistently held that such a

violation of the law of *uniformity of taxation* is prohibited by the clause above quoted from the Fourteenth Amendment.

We, however, will not in this brief enter upon the discussion of this proposition, since it is fully elaborated in "Point II" of the brief of our brother Thacher, to which we beg leave to refer for the contention of the plaintiff in error upon this point.

Conclusion.

There were many propositions advanced and questions discussed in the case when before the Colorado Supreme Court, which, as we understand its practice and procedure, will not be considered by this Honorable Court; we therefore refrain from their discussion.

Some of them were in relation to the construction and effect of the provisions of the Colorado Constitution, and questions arising under Colorado statutes or dependent upon Colorado decisions; also whether the exaction made by this statute was a mere exercise of *the ordinary power of taxation*, and if so, what kind of tax it was. The Colorado Supreme Court, as appears by its opinion set forth in the record, took the position that this was not a "property tax," but was an "occupation tax." The plaintiff in error contends that, strickly speaking, this exaction is not a *tax* at all, but is, as the Colorado Supreme Court properly characterizes it in one portion of its opinion, a mere "bonus or conventional price," arbitrarily charged by the State of

Colorado upon foreign corporations for the "right to do business as a corporation" in the State of Colorado.

Plaintiff in error sincerely believes, and therefore contends, that the latter announcement of the Colorado Supreme Court is correct, and that strictly speaking, said statute does not impose *a tax* at all; but plaintiff in error further contended in the Colorado Court, and will so contend here if the question is raised, that if the exaction attempted by this statute is *a tax* at all, then it is a *property tax* and not an "occupation or license tax." If we are correct in this contention, then according to the express announcement of the Colorado Supreme Court itself, the statute cannot be upheld.

To discuss these propositions at this time would be in the nature of anticipating a defense. We, therefore, do not feel at liberty to discuss them until it shall appear later on in the argument whether or not the defendant in error will advance and rely upon such contentions.

We respectfully submit that the Colorado Act of March 22, 1902, is invalid because in violation of the Federal Constitution in each and all of the respects above pointed out, and that the judgment of the Colorado Court in upholding and attempting to enforce said provisions of that Act, is erroneous.

We, therefore, humbly pray that the judgment and decree of the Colorado Supreme Court may be reversed and the Act aforesaid declared to be unconstitutional and invalid *quoad* Sections 65 and 66 thereof.

For the convenience of the court, we subjoin

hereto an Appendix setting out such portions of the Colorado statute as we think probable the court may wish to refer to incidentally during the consideration of this case.

Respectfully submitted,

JOEL F. VAILE,

CHARLES W. WATERMAN,

Solicitors of Plaintiff in Error.

WM. W. FIELD,

Of Counsel.

APPENDIX.

EXCERPTS FROM THE COLORADO STATUTES RELATIVE TO CORPORATIONS:

Mills Annotated Statutes:

Sec. 476. "Corporations formed under this act shall be bodies corporate and politic in fact and in name, by the name stated in such certificate, and by that name have succession for the period for which they are organized; may in any court of law or equity in this State sue and be sued, may have a common seal, which they may alter or renew at pleasure, by filing an impression of the same in the office of the secretary of state; may own, possess and enjoy so much real and personal estate as shall be necessary for the transaction of their business, whether acquired by purchase, grant, devise, gift or otherwise and may, from time to time, sell and dispose of the same or any part thereof when not required for the use of the corporation. They may borrow money and pledge their franchises and property both real and personal to secure the payment thereof; and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed, as named in their certificate of incorporation."

* * * * * *

Sec. 499. "Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State residing at its principal place of business upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. * * *"

* * * * * *

Sec. 500. "Every company incorporated under the laws of any foreign State or kingdom or of any State or Territory of the United States, beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the secretary of State a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authenticated by the proper

authority of such foreign State, Kingdom or Territory."

* * * * * *

Sec. 503. "Suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and in like cases as natural persons."

Colo. Session Laws, 1897, Chapter 51, p. 157:

"Section 1. Every corporation, joint-stock company or association incorporated by or under any general or special law of this State, or by or under any general or special law of any foreign State or Kingdom, or of any State or Territory of the United States beyond the limits of this State, having capital stock divided into shares, shall pay to the Secretary of State for the use of the State, a fee of ten dollars in case the capital stock which said corporation, joint-stock company or association, is authorized to have, does not exceed fifty thousand dollars; but, in case the capital stock thereof is in excess of fifty thousand dollars, the Secretary of State shall collect the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of cer-

tificate of incorporation, articles of association, or charter of said incorporation, joint-stock company or association, in the office of the Secretary of State; and no such corporation, joint-stock company or association shall have or exercise any corporate powers or be permitted to do any business in this State until the said fee shall have been paid; and the Secretary of State shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock company or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

"Section 2. Any foreign corporation doing business in this State, that has, since the filing or its certificate in this State, increased its capital stock, without paying the fees prescribed by the law of this State at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this Act, and it is hereby made the duty of the Secretary of State to at once cause action to be brought against any foreign corporation for recovery of such fees, and a certified copy of the certificate of such increase, on file in any foreign State, shall be sufficient evidence to sustain a judgment for the amount of

such fees and an action in the nature of a writ of quo warranto shall lie against any foreign corporation to test its right to exercise corporate franchises in this State."

Colo. Session Laws, 1901, Chapter 52, p. 121:

"Sec. 10. No corporation, joint-stock company or association, incorporated by or under any general or special law of this State, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint-stock company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint-stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Colo. Session Laws, 1902, Chapter 3; (The Act of March 22, 1902):

"Sec. 2. All taxable property shall be listed and valued each year and shall be assessed at its full cash value.

* * * * * *

"Sec. 13. Whenever the terms mentioned in this section are employed in this Act, they are employed in the sense hereinafter affixed to them.

"The term 'real estate' includes first all lands or interest in lands within the State, etc.

"The term 'improvements' includes all buildings, water rights, structures, fixtures and fences erected upon or affixed to lands, whether the title has been acquired to said land or not.

"The term 'personal property' includes everything which is the subject of ownership, whether tangible or intangible, and not included within the term 'real estate.'

"The term 'credit' includes every claim or demand for money, labor or other valuable thing and every annuity or sum of money receivable at stated periods, etc.

"The term 'intangible property' shall include rights and credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights, having a value for the purposes of income or sale of itself or in connection with other property.

"Sec. 14. Except where otherwise herein provided, the phrase 'taxable property,' as used in this Act, includes real property, personal property, property that savors of both real and personal, property rights and credits and all intangible property as defined in the preceding section, etc.

"Sec. 15. All property, not expressly exempted by law, shall be subject to taxation. The term 'taxation' as herein used shall be held to include both tangible and intangible property.

* * * * * *

"Sec. 60. * * * Except as herein otherwise provided, in determining the value of taxable property in this state of corporations, foreign and domestic, the value of the capital stock and bonds of each corporation shall be received and considered and shall be competent evidence of the value of the entire plant of such corporation, but any and all other evidence of the full and true cash value of said property, both tangible and intangible, shall be received and considered in arriving at the value of the entire plant of such corporation.

"Sec. 61. In arriving at the value of the property owned by any corporation, foreign or domestic, not only its tangible property, whether it be within the state or partly within and partly without this state, shall be looked to by the assessor and state board of equalization, but its intangible property such as special privileges, rights of way, fran-

chises, contract rights and obligations, shall be considered, etc.

* * * * * *

"Sec. 63. Every corporation doing business in two or more counties of the state shall, etc."

(The appellant is such a corporation.)

"The tax upon the intangible property of every such corporation shall be a lien upon the tangible property of such corporation wherever situate, and if any such tax is not paid when the same ought to be paid, the treasurer of the county where occurs the failure to pay such tax shall collect the said tax in the same manner and with like effect as if the same were delinquent taxes against tangible property.

* * * * * *

"Sec. 130. All taxes, levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon until the whole amount of such tax is paid."

FILE COPY.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Office Supreme
FIL
DEC 19
JAMES H. Mc

OCTOBER TERM, 1906.

No. 143.

THE AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF PLAINTIFF IN ERROR.

JOEL F. VAILE,
C. W. WATERMAN,
Solicitors for Plaintiff in Error.

WM. W. FIELD,
Of Counsel.

F. P. DUMARS, Printer, 1748 Stout Street, Denver. Phone, 2276.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1906.

No. 143.

THE AMERICAN SMELTING AND REFINING COMPANY,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO EX REL. HENRY A. LINDSLEY, District Attorney for the Second Judicial District of the State of Colorado,
Defendant in Error.

Error to the Supreme Court of the State of Colorado.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The very limited time that intervenes between the service of the brief for defendant in error in this cause and the date set for its final argument before this Honorable Court does not suffice for the preparation and printing of more than a very meager and succinct reply to the brief of defendant in error.

At the very outset of our reply we beg to say that, with all respect to the Honorable Attorney General for the State of Colorado, his brief cannot be relied upon when purporting to state the contentions made and propositions relied upon by the plaintiff in error. Said attorney general in his brief does not, in any instance, exactly or accurately state or reproduce any of the propositions or contentions formulated on behalf of the plaintiff in error. Instead of meeting those propositions squarely he paraphrases or reformulates them, and then undertakes to answer them as so remodeled by him, although such remodeling in every instance makes the proposition which he then proceeds to answer radically and materially different from the proposition as advanced and contended for by the plaintiff in error.

As the quickest (though, if time permitted, perhaps not the best) method of reply we will follow the order of subject and discussion appearing in the brief for defendant in error, to-wit:

The Nature of the Tax.

By the law as applicable to the Colorado statute under discussion, as well as by the express statements and admissions of the opinion of the Colorado Supreme Court and of the Honorable Attorney General of Colorado in this cause, it is clear that the

exaction, contemplated by Sections 64-6 of the Revenue Act of March 1902, must be assigned to one of the three following classifications, to-wit: 1. A *bonus* or conventional price "for the right, privilege or franchise *to do business as a corporation* in the State of Colorado; 2. A tax upon *property*, tangible or intangible; or 3. An occupation or business tax.

1. *Bonus or Conventional Price for the Franchise, Right or Privilege to do Business as a Corporation in the State of Colorado.*

It is to this classification that plaintiff in error contends, and has always contended, that the exaction, contemplated by the statutory provisions under consideration, must be assigned; but it is not necessary in this Reply to elaborate the discussion upon this proposition, since it has already been fully elaborated in the principal briefs for plaintiff in error. The Colorado Supreme Court and the distinguished counsel for the defendant in error clearly concede that, if this exaction is properly assignable to said classification or character, the statute cannot be sustained; and the main strength of the argument of Colorado's Supreme Court and its Attorney General is directed to an attempted demonstration that such character or classification cannot be assigned to said exaction.

It seems to us wholly incomprehensible what rule of language or logic the Colorado Supreme Court resorted to in arriving at a conclusion which gives a diametrically opposite meaning and effect to two statutes whose language, (so far as affects the

exact question under consideration), is as nearly identical as possible without literal repetition. Notwithstanding the substantial identity of the language used in the two statutes, the Colorado Supreme Court holds that the one statute imposes an arbitrary conventional price for a right or privilege to do business, and the other imposes an occupation tax upon the particular business engaged in.

Speaking of the payment made by the plaintiff in error, under the statute which was in force when it first came into the State, (see Appendix to our principal Brief, pp. 66-7),—the Colorado Supreme Court says:

> "It is the conventional price or bonus which the corporation pays to the state for the privilege of coming into this state to do business as a corporation, subject to all legitimate taxation, etc."

And further on:

> "We have already held that this filing fee was the conventional price for appellant's right of entrance as a corporation, and when paid, merely entitles it to come into this state to do business as a corporation, etc."

Then the Supreme Court proceeds with an attempted differentiation of the *right*, which the corporation obtained by the original payment, from the *right* for which payment is demanded by Sec. 65 of the Act of March 22, 1902; and finally holds the latter to be "a tax on *the* business of foreign corporations."

This at once suggests a comparison of the two statutes. The first (see pp. 66-7 of our principal Brief) provides:

> "No such"—a foreign—"corporation, joint stock company or association shall * * * be permitted to do any business in this State until said fee shall have been paid."

The language of the second (§ 65, p. 6 of our Brief) is:

> "Every foreign corporation * * * shall, * * * as a condition precedent to its right to do any business within the limits of this State, pay annually, etc."

Is not the language of each of these statutes the exact equivalent of the other? If said statutes were being interpreted solely by the language used in them, and without reference to a pending controversy or to a particular state of actual facts, would not the natural conclusion be immediate and unhesitating that they are exact equivalents, the one of the other, and that the burden imposed by each is of exactly the same kind, character and class?

Under such language in the statutes, if the first was an arbitrary "bonus or conventional price for the right to do business" in the State, then so must the second also be. If the first is in purchase of a *right*, then, under the language of Sec. 65, the second cannot be an occupation tax on the particular business followed, but is also a price demanded for the *right* to do business as a corporation.

But the Colorado Court plants its decision squarely and alone upon a holding that the later statute imposes only an occupation or business tax, and therefore this Reply will be mainly addressed to the law which determines and controls "occupation taxes."

2. *Property Tax.*

Although repeatedly and emphatically asserted by the distinguished counsel for defendant in error and also by the Colorado Supreme Court in its opinion, plaintiff in error does not, and has never contended, that the exaction or burden attempted to be imposed by said statutory provisions is properly or legitimately "a property tax." The contention of the plaintiff in error is, and has always been, that it can be only properly and legitimately construed to be an arbitrary "*bonus* or conventional price" for the franchise, right or privilege *to do business as a corporation* in the State of Colorado.

But plaintiff in error has contended, and still contends, that, if by any legitimate construction or legally permissible interpretation of these statutory provisions, the exaction contemplated does not come within and belong exclusively to the classification first above defined, then, under the peculiar language of the Colorado Revenue Act of 1902, this exaction must be considered "a property tax"—a tax upon intangible property—upon the franchise and privilege to do business as a corporation in the State of Colorado. And in the discussion of the next subheading we will make exact quotation of unqualified statements, made by the Colorado Supreme Court

and also by the brief for defendant in error, which, if accepted as correct, absolutely demonstrate that this is "a property tax;" and, being such, is imposed upon a subject of taxation which has been already, at least once, taxed under previous provisions of the Colorado Revenue Act of 1902. (See our printed brief for plaintiff in error, pp. 68-71.)

The brief for defendant in error devotes considerable time and space to an attempted distinction between taxes upon "property" and taxes upon "franchises." A detailed reply to these portions of the brief for defendant in error is unnecessary; for the aforesaid provisions of the Colorado Revenue Act of 1902 clearly shows that such distinction has been wholly obliterated and no longer exists in the State of Colorado.

Under the complicated and diverse forms of the statutes of the several States it necessarily follows that what is included in the term "property tax," *varies* with the respective constitution and statutes of each particular State determining what constitutes "property;" and it cannot be denied that any tax which is imposed directly upon "property" is "a property tax." From this it logically and legally follows that the constitution and statutes of each State must be considered in determing the exact intendment and effect each decision turning upon this point, and how far they are pertinent and influential precedents upon a similar question, arising under the constitution and statutes of another State.

From the dawn of modern civil government down to within the last few decades, the term "property," for the purpose of taxation,—*i. e.*, "taxable property,"—covered only visible and tan-

gible property, to-wit: Realty, on the one hand, and Personalty,—*i. e.*, chattels,—on the other hand. Up to that time all actual values were embodied in such *tangible property*, and substantially all profits from the ownership and use of property could be directly traced to *tangible property*.

Within the last forty or fifty years, however, new avenues of business have opened up and new methods of business adopted; until during the last few decades the larger proportion of profits have arisen from things which were *intangible*, and more or less incapable of satisfactory definition, but which were, nevertheless, recognized to be of vast actual material value.

Consequently, there has been a constant effort on the part of the taxing power, and of the courts in aid of the taxing power, to reach these *intangible things* and to have them recognized as taxable. Up to the present, in all American jurisdictions, this purpose has been sought to be effected by imposing some of the burden for revenue purposes on "franchises" and "privileges," having an evident value, —and thus have arisen what in many of the decisions are spoken of as "franchise" or "privilege" taxes, as contradistinguished from "property taxes," or taxes on tangible property. Many of the States have not yet crystalized this extension of the subjects of taxation into the form of *taxable property*, so that they can be made subject to *property taxes*. Some of the States, including Colorado, have endeavored, with more or less success, to make *these intangible things* have the character and distinctiveness of *property*, and have adopted constitutional provisions and enacted statutes with that end in view; so that

to-day, in many of the States, *of which Colorado is one*, "franchises," "privileges," and other intangible things, of evident value and profitableness, have been brought within the term "*property;*" and taxable property has been made to include, not only tangible property as theretofore, but also to cover those *intangible things* of value, to bring which within the scope of taxation, has heretofore taxed the ingenuity of legislatures and courts.

When any of these intangible things have by statute been made to take on the character of *property* and to be taxable as such, there is patently no longer any need *or justice* in continuing the former idea that they must be reached for taxation by some special method and designation other than by "a property tax."

Furthermore, being under such statutes taxed *as property*, it is no longer reasonable or just that they should be taxed again under the designations or classifications, under which they were subjected to taxation previous to the time when they could be included in the designation "property." To enforce the *new* classification and also adhere to the *old* classification evidently and necessarily results in double, and therefore unfair, taxation, and unequal protection of the law.

Under the Colorado statutes "taxable property" to-day not only includes the *tangible property* of the past, but also *intangible property* having an evident and more or less ascertainable value, and heretofore designated as "franchises," "privileges," "powers," etc.

To determine then whether a tax upon these valuable *intangible assets* is "a property tax" it is not

sufficient or fair to turn decisions and statutes under which the only things taxable as "property," and the only things included in "a property tax," were *tangible* and visible things.

It would be interesting and instructive in the present case to examine the constitution and statutes of the several States of this Union; and it will probably surprise the court, as it has ourselves, to find, upon such an examination, that, under the respective constitutions and statutes of a very large number of the States, "property,"—for the purpose of taxation, "taxable property,"—still includes, by the express terms of said statutes, *only* tangible and visible things; and, therefore, it is not surprising to find that, in the decisions of such States, a tax levied upon these intangible things of value are still given a specific designation as, for instance, "franchise" taxes, "privilege" taxes, etc., and a distinction made between these and strictly "property taxes."

To the present condition of the constitutions and statutes of the several States in this respect, *Cooley on Taxation* (3rd Ed.), devotes considerable space, pp. 274-342.

It becomes pertinent, therefore, in determining what *in Colorado* constitutes "a property tax," to study carefully the *exact terms of the Colorado revenue statute*, and at the outset we desire to call attention to the fact that formerly, and during the period when the decision was made by the Colorado Court in *D. C. Ry. Co. v. Denver*, 21 Colo. 350,—the Colorado revenue statutes were, and until within the last few years remained, of such character that "property" and "a property tax" included *only tangible property;* and that "*intangible property*" could not

be reached under such designation or classification.

But under the late Acts of the Colorado legislature, culminating in the revenue statute of 1902, the scope of the term "property" has been very much enlarged so as to bring within that designation *intangible property* as well and all those things which, though not visible and tangible, have an evident, and more or less ascertainable, value. Under such a statute "property," and "a property tax," now include these *intangible things*, which were theretofore unsusceptible of direct taxation as *property*, and which previously had to be reached for revenue purposes under the guise of "license," "franchise," "privilege" taxes. A decision now, which disregards these intangible things *as being property*, which holds them not embraced within the designation "taxable property," and adjudges a tax upon them to be not "a property tax," is inapplicable and not in logical or legal conformity to the law as it stands in this Act of 1902.

See,—§§ 2, 13, 14, 15, 16, and 61, of the Act of 1902 set out in the Appendix to our principal brief, pp. 69 to 71.

Under such a statute the terms, "property" and "property tax," are very much enlarged and include, not only as theretofore tangible property, but also *intangible property;* and the latter, *under the express terms* of the statute, includes all the "franchises," "privileges," "powers," etc., belonging to a person or corporation. Therefore that which theretofore could not properly be designated, "property,"—that which was therefore susceptible of no other designation than that of "a franchise," "a privilege," is to-day as much included in the

term "property,"—and a revenue imposition thereon is as much included within the term "a property tax,"—as is real estate and chattel property, or the taxes imposed thereon. The franchise *to be* a corporation thereby becomes *property* and a revenue imposition upon it *a property tax;* so also the franchise or privilege *to do business* within the State: So also the capital stock of corporations: And so on throughout the entire list of "franchises," "rights," "privileges," "powers" and other *intangible* things of value, which therefore did not come within the term "property," and which, therefore, were not susceptible of "a property tax."

If, then, what was theretofore merely a franchise, right or privilege, insusceptible of direct taxation, as "property," is by the express terms of the statute made "property" for taxable purposes and subjected to a "property tax," it cannot be subjected to a second and entirely independent tax under its old designation of "franchise" or "privilege" tax. And it logically and legally follows that decisions, which turn upon the point that such things were *not property* and not susceptible of taxation as *property*, are not pertinent or controlling in a case arising under a statute by which the same things are *expressly made "property,"* required to be included within the term "property," and subjected to taxation as such.

It is therefore unnecessary and immaterial to the present case to review the numerous authorities referred to in the brief for defendant in error where "franchises" and "franchise taxes" are distinguished from "property" and "property taxes," and taxation upon the former upheld.

3. *Occupation Tax.*

Clearly conceding that the Colorado statutory provisions under consideration cannot be sustained if the exaction therein contemplated comes within either of the classifications just above stated, the Colorado Supreme Court and the defendant in error assert that the enactment is nevertheless valid because, as they hold and assert, it is "an occupation tax,"—a tax upon "THE business of corporations."

Just here we urge upon the Court's attention the unusual importance and effect of the presence or absence of that little orthographic particle,—"the Article,"—before the word "business," in the statute itself and in the discussion thereof by the Colorado Supreme Court and by the defendant in error. In the statute, neither the definite nor the indefinite Article is used preceding the word "business." In the opinion handed down by the Colorado Supreme Court and in the argument for defendant in error, one or the other of these little "parts of speech" is *invariably used* when the effort is made to give to this exaction the character of an occupation or license tax.

[It may be assumed that in all quotations hereinafter made from the opinion of the Colorado Supreme Court, the brief for defendant in error, or from authorities cited, the *italics* are ours.]

The Colorado Supreme Court says (Trans., p. 58, fol. 126):

> "We hold that the tax authorized by Section 65, called a license tax, is, in form of an excise, a tax upon *the* business of for-

eign corporations and is levied for the purpose of State revenue."

And, again (p. 64, fol. 137):

> "We are satisfied that this corporation license tax is on *the* business of foreign corporations which are established and doing business in this State."

In the brief of defendant in error it is said (p. 11):

> "This tax is undoubtedly assessed for *the privilege* of carrying on business."

If we accept this statement as correct, then it necessarily follows from Sections 2 and 13 of the Revenue Act of 1902 (brief for plaintiff in error, p. 69), that "the privilege," subjected to this tax, is "property" and has already been taxed as "property" for its full value.

Furthermore, if this tax is assessed for the privilege of carrying on business"—*note the absence of any and all qualifying particle or phrase*,—then, it cannot be a tax on the occupation or *the* business which is carried on.

Again, the brief for defendant in error, after quoting Sec. 13 of said Act, asserts (p. 15):

> "When a foreign corporation files its charter in the office of the Secretary of State of Colorado, and complies with certain laws governing its admission, it acquires the right to do business for the period of twenty years, subject of course to any law

qualifying this right. *This right to do business is a franchise or power.*"

If this assertion is accepted as correct, then "this right to do business" is *property*—intangible property—and taxed as such by said Section 13. Furthermore, it is property acquired and fully paid for by, and absolutely vested in, the corporation upon the doing of the acts mentioned in the above quotation.

Immediately following the above statement and concession, the brief continues:

> "But we insist that the corporation cannot exert this right or power to do in *any particular* business, and thus exempt *the* business from taxation. Business, trades or occupations are distinct subjects of taxation and are not included in sections 13 to 15 inclusive. The matters mentioned in these sections affect persons as well as corporations. No one would claim that by virtue of these sections an individual could escape paying a tax for the privilege of conducting *a* business, trade or profession, or that a liquor dealer could escape paying a license tax."

And on page 21, it is said:

> "The power 'to do' and *the* business of the corporation are distinct subjects of taxation."

Here the distinguished counsel for defendant in

error—inadvertently it would seem—states correctly the law or criterion by which it is to be determined whether the tax imposed is an occupation tax. In order to constitute a tax, an occupation tax, or a business tax, the "particular business" subjected to the tax must be expressly specified by the law imposing the tax, or be ascertainable by clear and necessary legal inference therefrom.

An infallible and essential test, of whether a law imposes a business or occupation tax, is the ability of the interpreter to put his finger with absolute certainty upon *the business or occupation*, which is subject to the tax. It is beyond controversy that *the* business or occupation engaged in is entirely distinct and separable from the *right*, franchise or privilege *to do business*. The latter is unquestionably taxable under this revenue act as "intangible *property*," and, as demonstrated in the opinion of the Colorado Court in the *Parsons case*, is entirely distinct and independent of the business which may be conducted under such general right, franchise or privilege: the former may by proper methods be taxed in addition to and simultaneously with the latter. In order, therefore, to properly hold a tax to be "a tax on an occupation or a business," the court must be able, *from the terms of the statute*, imposing such tax, to say what is *the specific business* or occupation subjected to the tax. In the *Parsons case* in 32 Colo. 221, *the* occupation taxed is "the liquor business." In the *Denver City Ry. case* in 21 Colo. 350, *the* business taxed is *the* business of operating *vehicles upon the public highway for hire*. In the *Kiowa County case*, 21 Colo. 185, *the* business taxed was *the* business of *stock-grazing*.

The same is true of occupation or business taxes laid upon attorneys at law, hotel keepers, auctioneers, peddlers, hackmen, etc. An alphabetical list of the occupations upon which business taxes are "customarily" imposed is set out somewhat at large in *2 Cooley on Taxation*, (3rd Ed.) pp. 1102 *et seq.*

In every instance of such a tax law, the court or the reader is able to point out, either from the terms of the statute itself, or by fair and legal inference therefrom,—what is *the precise business* or occupation subjected to the tax. A statute, which would attempt to provide in general terms that a person should not engage in any business whatever, nor any attempt to earn a livelihood, without being subject to a tax, would not for one instant receive the endorsement of the courts. While it seems to be now well settled law that a State may at its election select out any business or occupation and impose an occupation tax upon that "particular" business, nevertheless a statute, which should say generally that any and every vocation or means of livelihood to which any person should direct his energies, should, without further specification, be subject to a tax, would be unheard of. But, if such a law were passed and could be upheld, it would not be upon the ground that it was "a business or occupation tax," but upon the ground that it was a tax upon the abstract and incorporeal "privilege" or "power" *to do business;* and as such it would, under the Act of 1902, come under the classification of *intangible property*, and such a tax, if it could be upheld, would be under such act "a property tax."

Take now the particular provisions of this statute, and formulate the question, "what is *the* busi-

ness or occupation attempted to be subjected to taxation by these provisions?" Answer would be absolutely impossible. Since corporations, after having received the franchise *to be* and the franchise *to do* business in a particular jurisdiction, may engage in *any* business that can be conceived of, it is apparent that Sec. 64-6 do not *point out* any "particular business" or occupation as the subject of the so-called "license tax" provided for.

Is it *the* business or occupation of the smelting and refining metalliferous ores that is intended to be taxed by these sections of the Act? The statute does not say so. There is nothing in the Act to indicate such an intent. If the next Colorado legislature should see fit to place a specific occupation tax on the smelting business, plaintiff in error would not be allowed to escape the payment of such tax upon the claim that the statute now under consideration imposes a business tax on smelting.

Is it the business of selling liquor? Is it the business of merchandising or of transportation for hire, or any other one of the multitudinous businesses and occupations in which persons, individual or corporate, engage?

Since, then, these particular provisions of the statute do not point out, either expressly or by any possibility of inference, the specific enterprises or occupations upon which it is intended to impose an additional burden for revenue purposes, how can it be said that this is a business or occupation tax? *A business* or occupation is certainly distinct from the *property*, which is used in that business or occupation. It is also distinct from the powers and privileges, which enable a person to do *the* business or to

engage in the occupation. We say, therefore, with the utmost confidence, that no statute can be said to impose "a business or occupation tax," *unless the particular business or occupation to be taxed can be ascertained from the language of the statute itself.*

We humbly and respectfully suggest that the Colorado Court, in reaching the "1" conclusion, stated in its opinion, confused the franchise *to be* a corporation and the right and privilege *to do* business in the State of Colorado, with *the* business or occupation in which the fact and right *to be*, and the power and privilege *to do* business, are exercised.

By the express words of the statute, this tax is imposed "as a condition precedent" to "the right to do business within the limits of the State." The burden imposed is not upon the particular or specific *business* engaged in, but upon the *right* or privilege of engaging in "business" at all.

At page 18, opposing counsel says:

> "The attempt of counsel to reduce the franchise 'to do' of a corporation, the identity with the business in which it is engaged is not convincing."

Most true:—"The attempt * * * is not convincing" because *no such attempt has been made* by counsel for the plaintiff in error. On the contrary, our intention and strenuous endeavor all along has been to call attention to and make clear the radical distinction between *the right* to do business and "*the* business" engaged in. The befuddling, we respectfully insist, is by opposing counsel, who starts out by saying distinctly and unequivocally (p. 11):

"This tax is undoubtedly assessed for the privilege of carrying on business;" and then devotes all the residue of his brief in an attempt to demonstrate that it is a tax upon "the particular business" which is engaged in by the party in whom said right or privilege inheres.

At page 16, opposing counsel says:

> "A consideration of the language of those statutes (Secs. 64 and 65) does not sustain the view taken by plaintiff in error. The language of the statute is that the tax is collectible as *a condition precedent* to its *right* to do any business within the limits of this State, and the penalty is a forfeiture of *this right* to do business until the tax is paid."

Note how plain and unambiguous is this language: "The tax is collectible as a condition precedent to its right to do any business, etc." It hardly seems possible for any two reasonably intelligent and fair minds to place a different construction upon such language, and if the Honorable Attorney General had stopped there, or had adhered to this declaration, we should have heartily said: "True, Oh King," but his very next sentence is: "Evidently the legislature had in mind the *concrete* business in which the corporation is engaged."

Possessing this rare faculty for reading the legislative mind—probably the most difficult and uncertain feat of mind-reading that ever was or can be attempted—will our distinguished brother, disregarding for the time the present case and the specific

business of the plaintiff in error and looking entirely to the statute, tell us what is the exact "concrete business," occupation, trade, avocation, calling or enterprise designated by the statute under discussion? Unless he can do so, then his assertion that this is a tax upon "the concrete business in which the corporation is engaged" is unsupported and he must fall back upon his previous admissions that: "This tax is undoubtedly assessed for the privilege of carrying on business;" (p. 11) "This right to do business is a franchise or power," (p. 15) and it thus becomes a *quod est demonstrandum* that the real subject of this attempted tax is "the abstract power acquired by the filing of the charter," (p. 16) accompanied by a compliance with the laws in force at that time, (p. 15).

Plaintiff in error most emphatically asserts that it does not deny, and never has denied, the right and the power of a sovereign State to impose an *occupation tax* or business tax upon any "trades, occupations, professions or business" which the law-making power may select *and sufficiently designate* as the subject of an occupation tax. Our sole and only contention upon the point under discussion is that it is patent, from the language of this statute, from the statements, admissions and assertions of the Colorado Supreme Court and of its attorney general, that the exaction contemplated by these statutory provisions is not an occupation tax. It is not a tax upon a "concrete," "particular," specific *business* or occupation; but it is a burden, under the name of a "license tax," imposed upon the abstract and general *right* "to do business as a corporation."

The brief for defendant in error says (p. 18):

> "Trades, occupations, professions and business are well-recognized subjects of taxation."

Most true as a general proposition. And the legislature has only to select and designate "the" "particular" or "concrete" "trades, occupations, professions and business" which shall be the subjects of taxation. In regard to some specific occupations and businesses it has been thus explicit in this very same "Revenue" Act of 1902. (See Appendix subjoined hereto.)

A few lines farther on it is said in this brief:

> "A natural person has the right 'to be and to do,' but in the case of corporations these attributes are conferred."

This is an attempted distinction predicated upon a wrong, or at least a confused, assumption. The real distinction is not in the "attributes conferred," but in *the conferring power*. A *natural* person has the right to be and the abstract right to do business as a gift from the Divine Creator; attributes which, by natural law and all Anglo Saxon constitutions, the law-making power of the civil government is prohibited from taking away, except as a punishment for wrong-doing or perhaps under overwhelming public necessity. The same attributes are conferred upon artificial persons *by human law;* but when once conferred, natural persons and artificial persons are upon identically the same footing, so far as concerns the protection of those attributes. In other words,

these "attributes," when conferred, are the same for artificial as for natural persons, and each is equally entitled to have their exercise protected. But a natural person cannot claim the right to exercise his inalienable right "to be" and "to do business" in any "particular," "concrete" or specific occupation or business; and, therefore, if the taxing power chooses to impose an occupation or business tax upon certain particular and specified occupations or avocations, the natural person affected has no ground for complaint. The same law applies to an artificial being when the attributes to be and to do have once been conferred upon it. As opposing counsel well says (p. 18):

> "When the power 'to do' of either a corporation or an individual is exerted in a specific business, the latter is taxable."

True, indeed; but we would add, and will later on demonstrate from authority, that there must be no discrimination between the two when engaged in the same identical "specific business."

On page 19 opposing counsel says:

> "The power of a corporation 'to do' differs from the same power in natural persons in respect that the charter defines what corporations may do."

That is, in natural persons it is the gift of natural or divine law, while in artificial persons it is the gift of human law.

Opposing counsel then says:

> "With this difference, *the powers are alike in natural and artificial persons.* But when either puts the power in execution by starting any particular business, the latter is a distinct subject of taxation under Sections 64 and 69 inclusive."

The first sentence of this quotation is absolutely correct; the latter as absolutely erroneous,—owing, evidently, to a misconception and misapplication of the term "subject of taxation." Neither a natural nor an artificial person can be "a subject of taxation." They are *tax-payers;* and the *subject* of taxation is some objective thing, tangible or intangible, which tax-paying "persons" possess or enjoy. In the statutory provisions under discussion, the corporation is not "the subject of taxation;" that must be a thing, corporeal or incorporeal, which the corporation possesses or enjoys. In this instance it is, according to plaintiff in error, the abstract or general *right* "to do business as a corporation;" or, according to the Colorado Supreme Court and the defendant in error, it is "*the* particular," "the concrete" business or occupation in which the corporation is engaged;—that is, in the present case, the occupation or business of smelting and refining metalliferous ores. The error in the last sentence of the above quotation is that it confounds the *tax-payer* with the "subject of taxation," and this brings us naturally to the subject of classification for purposes of taxation, to which the brief for defendant in error devotes considerable time and space.

At page 12 it is rightly said:

> "Double taxation of property is not permissible in Colorado. Bd. of County Comrs. v. Wilson, 15 Colo. 90, 96."

And at page 20, defendant in error quotes Sec. 3, Art. 10 of the Colorado Constitution, requiring that: "all taxes shall be uniform upon the same class of subjects within the limits of the authority levying the tax," and comments: "the limitation contained in this section requires the tax to be uniform only on the same class of subjects; for instance, all mining property might be taxed in one manner and railroad property in another, and personal property in still a different way, etc."

This is all true and in accordance with the universal announcement of authority, but it is quite distinct from the claim which the defendant in error now makes, to-wit: that the taxing power may for purposes of discrimination *classify the tax-payers* and impose *a different tax* upon the *same subject* of taxation. For instance, it may be conceded for the purposes of this argument, that the legislature might, if it chose, select, and by enactment designate, the smelting and refining business as the subject of special taxation by way of "an occupation tax," but it could not say that persons of Anglo Saxon descent, or the residents of Denver, should pay one tax; persons of Romaic descent, or the residents of Pueblo, another tax; and persons of Oriental or African descent, or residents of Leadville, still another tax, —upon the same identical "subject of taxation," to-wit: the smelting and refining business. This would not be classification of the *subjects* of taxation, but

be attempted classification of *tax-payers* possessing or enjoying the same identical *subject;*—a kind of classification which the laws have never recognized nor permitted.

In like manner, while it may be entirely within the power of the Colorado legislature to impose a specific business or occupation tax upon the smelting and refining of metalliferous ores, it is not within the power of the legislature to classify the tax-payers who may be engaged in that same identical business, and say that tax-payers who are *natural persons* shall pay no "occupation tax" at all, but that tax-payers who are *artificial persons* shall pay such a tax upon the same identical occupation. Nor can it say that artificial persons, who are *domestic corporations* shall pay only "two cents per thousand" of the capital invested; and artificial persons who happen to be *foreign corporations* shall pay "four cents per thousand,"—upon the same identical *subject* of taxation. In other words, it cannot make the personality of the tax-payer, and not the character of the subject of taxation, the basis of classification.

If, then, it were conceded that the statutory provisions under discussion impose "a business or occupation tax," as held by the Colorado Supreme Court, the result would be that any natural person or individual can engage in the smelting and refining business in the State of Colorado absolutely free from this tax, while artificial persons must pay an occupation tax upon the same identical business; that domestic corporations pay one tax on *the* occupation, while foreign corporations, after the State has invited and received them within her jurisdiction, and for a valuable consideration and agreed price, con-

ferred upon them the same privileges and powers as her domestic corporations enjoy,—must pay twice as heavy a tax upon the same identical occupation. The authorities are uniform and unanimous that while occupation taxes are not required to be uniform on different occupations or subjects of taxation, yet they must be uniform upon all persons engaged in the same occupation. For instance, a natural person engaging in the liquor traffic must pay a special license or occupation tax, and an artificial person engaging in the same business is taxed at the same identical rate. And even in this discountenanced occupation,—tolerated but not approved,—no case can be found in which a tax was upheld where there was a discrimination predicated upon *the personality* of the tax payer.

Although the impossibility of perfect uniformity in general of taxation is well recognized, it is undoubtedly the law that occupation taxes *must be uniform among themselves*. Under the subject of "occupation taxes" the law is thus laid down in *21 Am. & Eng. Ency. of Law*, (2nd Ed.), pp. 802-3:

> "Most of the state constitutions provide that taxes shall be equal and uniform, but it is well settled that such provisions have reference primarily to property taxes and do not apply *in their full force* to business taxes or licenses. * * *
>
> "The requirement of uniformity, and equality *does apply to business taxes*, however, to the extent that the same tax must be imposed upon all persons belonging to a given class. * * * A tax which is the

same upon all persons who belong to a class is sufficiently uniform and equal, but one which exempts certain members of a class or discriminates between different members of the same class is invalid."

And again (p. 777):

"This power of taxation, however, is necessarily limited to subjects within the jurisdiction of the power levying the tax, and a state cannot tax persons residing within its borders on account of business which they carry on beyond its jurisdiction; *nor can it discriminate against non-residents* or against goods manufactured or produced in another state."

In *2 Cooley on Taxation*, (2nd Ed.), 1100, it is said:

"It is generally held that occupation taxes must be uniform upon the same class of subjects."

Pullman P. C. Co. v. State, 64 Tex. 274, 280.

Foster v. Pincher, 4 Wyo. 494; 25 Pac. 472, 475.

Gould v. The Mayor, 55 Ga. 678, 682-3.

City v. Bieler, 138 Ind. 30; 36 N. E. 854, 860.

Kiowa Co. v. Dunn, 21 Colo. 185.

Furthermore, it is undoubtedly the law that, while classification for purposes of taxation is per-

missible, and that uniformity in a particular class is sufficient compliance with the constitutional provision, yet it is also true that such *classification* cannot be arbitrarily made, but must have a reasonable foundation.

21 Am. & Eng. Ency. Law, (2nd Ed.), 804.

Magoun v. Illinois, 170 U. S. 283.

If the tax, provided for by these sections, is "an occupation tax," then, in order to be uniform, it would have to be imposed *alike upon all engaging in the same occupation*, and all would have to be taxed in the same way, and at the same rate. If exemptions are made in favor of any, the same exemption must inure to the benefit of all.

Let us, then, call attention to the lack of uniformity, both as to the rate of the tax and as to the classification of the persons who shall pay it: And let us take as a basis of this analysis *the smelting business*.

a. All natural persons or unincorporated associations, irrespective of residence or citizenship, are *wholly exempt* from this tax.

b. All domestic corporations having a capital of less than $25,000 are *wholly exempt*.

c. Domestic corporations, with a capital stock of $25,000 or more, are charged "two cents *upon* each one thousand dollars of capital," without exempting any portion of their stock.

d. Foreign corporations are, without exemption, charged with "four cents *upon* each one thousand dollars of capital."

Here, therefore, there is a lack of uniformity, (1) between natural persons or unincorporated associations on the one hand, and corporations on the other, to the detriment of the latter; (2) between domestic corporations having $24,999.99 or less of capital stock and those having a capital stock of $25,000 or over,—in order to make this classification uniform and reasonable the law would require that corporations having $25,000 or more of capital stock should be exempted up to $24,999.99; (3) Again, a distinction is made between domestic corporations and foreign corporations. And there is no "reasonable basis" apparent for this difference of classification.

The inequity of this statute is apparent even if we confine ourselves entirely to the non-resident and so-called foreign persons. A New York capitalist,—say, for instance, John D. Rockefeller, or M. Guggenheim's Sons, – may carry on a smelting business in Colorado with a capital of $100,000,000 without paying one cent of taxation under these particular provisions, while appellant, coming in with identically the same amount of capitalization and engaging in identically the same business, must pay an annual tax of $4,000.

As the legislature is supreme as to the rate or amount of the tax, and may change it at will, the effect of such a tax would be in many instances to *entirely exclude* foreign corporations (and domestic corporations, too, if their capitalization be $25,000 or over) from a particular business; or, in any event to add to the other expenses of the business the sum of $4,000, not imposed upon their competitors,—which might, and in many instances would, make it

impossible for such a corporation to enter into competition with an individual, an unincorporated association, or an exempted corporation, engaged in identically the same business and investing therein identically the same sum.

In *1 Cooley on Taxation*, (3d Ed.) 37, speaking of "Taxes on corporate franchises," the text writer says:

> "A tax on a corporate franchise may or may not be just or politic. If the business is one of which corporations have a monopoly, a tax on their franchises, however heavy, would not be burdensome, because the result would only be to add to the cost of whatever the corporations supply to the public, so that the tax would really be paid by the community at large. If, on the other hand, the business is one *open to free competition* between corporations and individuals and in respect to which corporations would enjoy no special privileges or advantages, a tax on the privilege of conducting the business under a corporate organization would be *wholly unreasonable and unjust* because it would give individuals and partnerships an advantage in competition; and their competition, keeping down prices, would prevent corporations from indirectly collecting any portion of the tax from the public and leave them to bear the whole burden of a demand which, under such circumstances, *must prove ruinous*. While, therefore, a tax on the corporate franchises of banks of issue, which

> are not subject of competition, might be entirely just, one on the corporate organization of a trading company, *with which every individual might compete*, would usually be wholly unjust, and, if continued, must result in the abandonment of a business which, under such circumstances, would be carried on at a ruinous disadvantage."

If this be true, as it undoubtedly is, of a tax upon corporate *franchises and privileges*, how much more true is it, that in *addition to such discrimination against the corporation* in the general property taxes, there is an additional special tax laid upon *the occupation* itself, while individuals or unincorporated associations engaging in the same business are entirely *free from each and both of said taxes*,—"the occupation tax" as well as "the property tax" on the corporate *franchises*.

Pages 21-8 of the brief for defendant in error are devoted to a citation of, or quotation from, a number of authorities, many of them decisions of this Honorable Court. Time and space does not permit us to comment upon these cases separately to distinguish them from the case at bar. We shall therefore only take the first as a sample of the pertinency of all, and remark that, accepting each and every one of those cases to be the law upon the point involved in each, not one of them conflicts with the contention of the plaintiff in error in the case at bar, nor supports the holding of the Colorado Supreme Court or the contention of defendant in error that the exaction under consideration is an occupation tax, that the law of uniformity in taxation does not apply.

The People v. Home Ins. Co., 92 N. Y. 328, was a case arising out of the contention of the insurance company that the State was not authorized to impose a tax upon the corporate "franchises." In the syllabus it is said:

> "The tax upon corporations imposed by said act are taxes upon franchises, not upon property, etc."

This could not be said *under the Colorado statute*, by which *franchises* are expressly made *property* and are subjected to taxation *as such*, and in like manner as other *property* is taxed.

It is also worthy of note that the New York court in upholding the validity of this franchise tax states as one of the grounds, showing the legality and justice of such a method of taxation, that said franchise tax, is made *in lieu of* the property tax upon the same subject. It is further said:

> (p. 339) "The statutes in question left the corporation still subject to the payment of local taxation (citation) always constituting the great bulk of taxation in the State, and attempted by a new system to collect only so much of the burdens laid upon them as annuity exclusively to the use of the State by tax upon their franchise alone. They were *expressly exempted from the customary tax* laid for state purposes upon their property by the general law and thus secured some compensation for this franchise tax by a partial exemption from the usual property tax."

And

> (p. 340) "The act further provides that such corporations shall be exempted from all further taxation for state purposes except upon their real property."

Thus it is seen that said decision was reached by the New York court expressly upon the ground that franchises generally under the New York statutes were not "property;" and further that the imposition burden placed upon the franchise was compensated for, and rendered just, by the fact that the company was *exempted* from other taxation.

Then, after commenting upon sundry authorities, the New York court says again:

> (p. 344) "Applying the test derived from these authorities, it seems conclusively established that the act under which this tax was levied must be held to impose *a franchise*, and not a property tax, etc."

And further (p. 348):

> "It must be borne in mind that this tax is a fractional tax for which *an equivalent property tax has been surrendered* and thereby substantial *equality of taxation* may be presumed to have been produced even as between individuals and the corporations taxed."

It is thus apparent that the New York court could not and would not have arrived at the conclusions, upon which that decision was rendered, under *such a statute as that now prevailing in Colorado*,

whereby the corporate franchises are expressly made *property*, taxed as *property*, and no exemption whatever from general property taxes is made in its favor.

When this case came to the U. S. Supreme Court (134 U. S. 594) the principal, and practically only, question considered—the other questions discussed being incidental to and for the purpose of arriving at a proper conclusion upon that leading question,—was whether the tax imposed by the New York statute was laid upon the capital stock or upon the corporate franchise; and all that was said by this Honorable Court in the course of that decision must be interpreted in the light of the exact question which the Court was then considering and determining. Most of the opinion is devoted to comment upon sundry authorities; and when the Court came to its conclusion (p. 606) on the particular case under consideration, it said:

> "In this case, we hold, as well upon general principles, as upon the authority of the first two cases cited from 6th Wallace, that the tax for which the suit is brought, is not a tax on the capital stock or property of the company, but upon its corporate *franchise*, and is not therefore subject to the objection stated by counsel, because a portion of its capital stock is invested in securities of the United States."

Bearing in mind, as above stated, that, except in special instances, *franchises* are, under the New York law, not *property*, while in Colorado they are made property and fully subjected to taxation as

such,—it is hard to conceive how this decision is a controlling, or even pertinent, precedent in the case at bar. It will be noted that in the New York case the Court holds that the capital stock was not taxed as such, but was simply referred to as a standard of measurement to ascertain the amount of the tax in each particular instance. By reference to the provisions of the Colorado Act of 1902, which appear in the appendixes to the several briefs herein, it will be seen that the capital stock of corporations is by that Act repeatedly referred to and required to be taken into consideration in the assessment of the various kinds of taxes against corporations; and we think that an examination of this "Revenue" statute will disclose that, outside of the provisions involved in this particular case, the capital stock of a corporation is at least twice required to be referred to and taken into estimation for the purpose of other kinds of taxes which are imposed by said Act.

On page 606 of the Home Insurance case this defining the application of the Fourteenth Amendment, says:

> "It is conceded that corporations are persons within the meaning of this amendment. It has been so decided by this Court, 125 U. S., 181. But the Amendment does not prevent the classification *of property* for taxation—subjecting one kind of *property* to one rate of taxation and another kind of *property* to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

Here is sufficient recognition by this Honorable Court of the correctness of the rule which we have above stated and contended for, to-wit: that classification for the purposes of taxation must be "classification of property," not classification of *tax-payers*. It must be classification of the *subjects* of taxation and not classification by the *personality* of the different tax-payers, who are possessing or enjoying the same identical kind of property or subject of taxation.

This Honorable Court further says:

> "And when such legislation applies to artificial bodies, it is not open to objection, *if all such bodies are treated alike under similar circumstances and conditions* in respect to the privileges conferred upon them and the liabilities to which they are subjected."

We respectfully submit that—although there is such a radical difference between the New York statute under consideration in the *Home Ins. case* and the Colorado statute under consideration in the case at bar, that it can hardly be said that the *Home Ins. case* is pertinent at all to the case at bar,—yet clear, legal and logical corollaries are to be inferred from propositions stated in that case, which strongly support the propositions relied upon by the plaintiff in error in the case at bar.

After a careful study of the cases cited by defendant in error, and especially those listed on pages 27-8, and 74, we submit that upon a fair examination and analysis of each case, in the light of the particular facts and questions presented in each, none of

those cases militate against the contentions relied upon by the plaintiff in error, nor support the interpretation put upon the Colorado statutory provisions now under consideration, by Colorado's Supreme Court and by its distinguished Attorney General; especially when sections 64-6 are studied and interpeted in connection with other tax imposing provisions of the same Act.

This brief has already exceeded the space to which at the beginning we hoped to confine it; and to take up the residue of the brief of defendant in error in detail would be impossible in the limited time at our disposal. We think that it would also be unnecessary: For as to all other contentions made in said brief, the reply is either so perfectly patent as to need no formulation; or the contentions of plaintiff in error upon the points have been sufficiently stated in our principal brief.

For instance, it is not necessary to occupy time and space to define unto this Court the extent of the conclusiveness of the Colorado decision or to demonstrate that this Court is not precluded by the finding of the Colorado Court, that the provisions of the Federal Constitution are not infringed by the Colorado statutory provisions under consideration. If, as opposing counsel contends, the construction given by the Colorado Court to the Federal Constitution were conclusive and binding upon this Court, then there would be no case in which this court had jurisdiction to review a finding of the State Court upon a question involving a construction of the Federal Constitution.

Nor need we go into the question "Exemption from taxation:" For notwithstanding the positive statement to the contrary by the Colorado Supreme Court and by opposing counsel, there is not and never has been any claim or suggestion of a claim by plaintiff in error to an exemption from any legal and valid tax.

It is apparent, upon reason and authority, as well as upon the express declarations and admissions of the Colorado Supreme Court and of counsel for defendant in error, that this proposed tax cannot be sustained, unless it is strictly *an occupation or business tax.* It is conceded that, as a "property tax," a "franchise tax," a "privilege tax," or as a *bonus* or "conventional price" for the privilege to do business as a corporation in Colorado, this tax cannot be sustained. If, therefore, the Colorado Court was mistaken and in error in saying that this was an occupation tax—"a tax upon *the* business of the corporation,"—then the conclusion it arrived at was erroneous and its decision should be reversed.

Respectfully submitted,

JOEL F. VAILE,

C. W. WATERMAN,

Solicitors for Plaintiff in Error.

WM. W. FIELD,

Of Counsel.

APPENDIX.

Sec. 18 of the Act of March 22, 1902, is as follows:

"Every person, company or corporation selling any malt, vinous or spirituous liquors shall, in addition to other license fee exacted by law, or by the ordinances of any municipality, pay to the State of Colorado an annual license fee of twenty-five dollars per annum in advance, for each and every saloon, restaurant, hotel, club, drug store, liquor store or other place where any said liquor shall be sold. The license aforesaid shall be issued by the treasurer of state, to whom the license fee aforesaid shall be paid; the said license to specify the date of issuance, the period which it covers, the name of the licensee, the place licensed, and that such license is issued subject to the ordinances of the city or town and to the regulations of the county on the subject, in which the place so licensed is located. Said license shall be conspicuously exposed at all times in the place thereby licensed; and all constables, sheriffs and police officers shall see to it that every such person, company and corporation within his jurisdiction has procured such license. Neither the county authorities of any county, nor the officers of

any municipality, shall issue, transfer or renew any license to sell any malt, vinous or spirituous liquors until such person, company or corporation shall in the first instance produce a state license, as provided herein, covering the whole period for which a license or a renewal or transfer thereof is asked from any county or municipality; PROVIDED, That, the said license may be transferable to successors in business.

FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

Office Supreme Court U. S.
FILED
OCT 9 1906
JAMES H. McKENNEY,
Clerk

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

MOTION TO SET CASE FOR ORAL ARGUMENT.

N. C. MILLER,
Attorney for Defendant in Error.

Smith-Brooks Press, Denver.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

MOTION TO SET CASE FOR ORAL ARGUMENT.

Comes now N. C. Miller, as attorney-general of the state of Colorado, and as attorney of record for defendant in error in the above entitled cause of action, and respectfully represents to this honorable court that the said case is numbered 143 on the docket, and he is informed that it will be called for trial durinng the month of December, 1906.

He therefore prays that said cause be set for a day certain in said month, for the following reasons:

Your petitioner is the only attorney of record in said case, and is the only attorney who has participated in its trial for the state, or who is acquainted with the case for defendant in error. His term of office as attorney-general expires on the second Tuesday in January, 1907, and his time, during the month of December, is largely occupied with exacting official duties at Denver in closing his official term, preparing his biennial report, and as a member of the canvassing board and other boards of administration, besides several important suits on the docket of the Supreme Court of the state of Colorado. He can not adjust his business at home with reference to this suit unless the case is set for a day certain.

It will greatly hinder and embarrass him in the discharge of his official duties in Colorado and in the Supreme Court of that state if he is obliged to remain in Washington indefinitely awaiting the call of said case for oral argument.

The place which said case occupies on the docket will require him to be in readiness during the month of December, and as the distance from Denver to Washington requires three days' travel one way, a greater latitude of time must be made in order to be sure of being present when the said cause is reached, than if the petitioner lived in the middle or eastern states.

Further, the petitioner represents that it is necessary to try said case at as early a date as is possible, and that it will be detrimental to the interests of the state to postpone said case to a later date of the October term, 1906, for the reason that a question of state revenue is involved, and none of the large corpo-

rations doing business in the state of Colorado are paying the annual state corporation license tax involved in this litigation, but are awaiting the decision in this suit. The taxes of such corporations are in arrears from May 1, 1902, to the present time, and their failure to pay prevents the state from paying some important appropriations in favor of the School of Mines, Agricultural College and State Normal School.

The legislature meets in January, 1907, and all bills must be introduced during the first thirty days of the session, and if the arrearages are not available to make good these appropriations, the legislature should know this fact in time to take care of this deficiency in some other way.

It will be sufficient if the case is set for a day certain in December, 1906, subject, however, to the conclusion of any other case that may then be on hearing.

He therefore respectfully represents that it will be a great accommodation and benefit to the state of Colorado if the prayer of the petition be granted.

Respectfully submitted,

Attorney-General of the State of Colorado.

FILE COPY.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

Office Supreme Court
FILED
DEC 7 19
JAMES H. McKE

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

N. C. MILLER,
Attorney General, for
Defendant in Error.

Smith-Brooks Press, Denver.

TABLE OF CONTENTS.

	Page.
Statement of Case	3
Evidence of Mr. Guiterman	5
Evidence of Mr. Waterman	10
Nature of Tax	10
Construction Is Reasonable	16
Decision of State Court Final as to State Constitution	29
Decision Final as to Federal Constitution Unless Its Operation Is in Violation	30
Uniformity Clause Applies Only to *Ad Valorem* Tax	35
Filing of Certified Copy of Articles of Incorporation Does not Make a Contract	36
Tax Does Not Violate Equality Clause	51
Provision as to Privileges and Immunities Not Applicable	59
Right to Classify Subjects of Taxation	51
Due Process of Law	69
Similar Cases	73
Interstate Commerce	75
Conclusion	88
Appendix	92
List of Cases Cited	102

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

STATEMENT OF CASE.

On March 22, 1902, the state of Colorado adopted an act requiring corporations to pay a state license tax of two cents in the case of domestic and four

cents in the case of foreign corporations, on every thousand dollars of capital stock.

The plaintiff in error, American Smelting & Refining Company, was incorporated under the laws of the state of New Jersey on the 4th day of April, 1899, and was then capitalized for the sum of $65,000,000.

On the 8th day of April, 1901, this corporation amended its certificate so as to increase its capital stock to $100,000,000, the par value of each share being $100.

On the 28th day of April, 1899, the company filed in the office of the secretary of state of the state of Colorado a copy of its charter, and paid therefor the fee of $9,792.50, under and by virtue of an act of the general assembly entitled, "An act concerning corporations," approved April 13, 1897.

On the 17th day of May, 1901, the company filed an amendment to increase its capital stock in the office of the secretary of state of Colorado, and paid therefor, as fees, the sum of $5,250, under and by virtue of an act of the general assembly entitled, "An act concerning corporations, etc.," approved April 6, 1901.

On the 21st day of May, 1901, the secretary of state executed and delivered to plaintiff in error a certificate of authority, under his hand and under the great seal of the state of Colorado, reciting and certifying that the company had paid all fees required by law, and that respondent was authorized to exercise any corporate powers provided for by law. This certificate was issued pursuant to section 491i, volume 3, M. A. S., Revised Supplement.

It only appeared necessary to examine two witnesses on the trial of this case.

Mr. Franklin Guiterman, the manager of the "American Smelting & Refining Company" in the state of Colorado, was produced by the company and examined as a witness. His evidence begins at page 39 of the record.

From this witness it appears: The company has seven smelters in Colorado; that its business consists in purchasing, smelting, reducing, refining and otherwise treating ores, minerals and metals and disposing of the products of such ores, minerals and metals; ores are shipped to the smelters in Colorado from mines in Utah, Idaho, Montana, California, Arizona, New Mexico, South Dakota, South America, Old Mexico and British Columbia.

The company "purchases outright the ores which it smelts." (Folio 86 of Record.)

The method of making these purchases is described by this witness in his direct examination as follows:

> "Q. Does your company purchase ores in states, territories and countries other than the state of Colorado, which are to be delivered to the respondent company by the sellers at the respondent company's plants in the state of Colorado? A. Yes, sir; it does.
>
> "Q. Are such ores so purchased, and contracted to be delivered, as referred to in my question, purchased and received by the respondent company at its plants in Colorado? A. In a large part, foreign ores are purchased in foreign territories, through local agencies, for which the cash is paid, and the transaction is completed there. The ores

are then shipped to Colorado by such agencies, on bill of lading, with draft attached.

"Q. But you do also contract for ores in other states, territories and countries outside of Colorado, whereby the contracts call for the delivery of the ores so purchased at your plants in Colorado? A. Yes, sir; to a considerable extent.

"Q. What portion of the ores purchased by your company and treated at its plants in Colorado come from other states, territories and countries outside of Colorado? A. Well, I should say, roughly speaking, about forty per cent., perhaps.

"Q. State whether or not ores containing valuable metals are shipped to the respondent company from points outside of the state of Colorado consigned to the respondent company, which, upon being received by the company at its plants in Colorado, are sampled and the value ascertained and paid for on that basis? A. Yes; there are such ores.

"Q. From what sources do they come? A. They come from the same states and territories that I have named.

"Q. Are there any other methods by which you purchase ores at points outside of the state of Colorado and receive them and smelt them in Colorado than those which you have testified to already? A. There are not."

* * * * * * *

CROSS-EXAMINATION.

"Q. I understand, then, Mr. Guiterman, that there are just two methods by which you obtain ores outside of Colorado; one is by the local agency existing in some of those states and territories, and foreign countries, determining the value of the ores in those states, territories and foreign countries, and it is paid for by shipping it to these plants in Colorado, with bill of lading attached, and paid for upon arrival here, isn't it? A. Yes, sir.

"Q. Now, you have no means of transportation of that ore from those points to your smelters here? A. It is foreign transportation, that is, by foreign companies.

"Q. That is done by foreign corporations that you have no interest or control over at all? A. Exactly.

"Q. And the shipment is from the foreign country wherever the mine is? A. Yes, sir.

"Q. To the plant in Colorado and the bill of lading ends there? A. It is either from the mine, General, or else from the sampling works in which the ore is sampled and then transmitted to the smelter, and value determined. If we settle there for it the value has to be determined by the same method of sampling that is used here; and draft is usually attached to the bill of lading.

"Q. And the destination of it is either the Denver smelter or some other smelting plant in Colorado? A. Denver or Leadville, or Pueblo.

"Q. After it is treated at the point in Colorado it is reshipped under a different bill of lading, made out in the name of a different owner? A. No—that is, you refer to the ore?

"Q. No; after it is treated? A. After the ore is treated the result, the product of that treatment, is base bullion or blister copper, which carries respectively gold, silver and lead, or copper, silver and gold; and those products are billed out to us to our refineries for further metallurgical treatment.

"Q. The consignor of this base bullion is the 'American Smelting and Refining Company?' A. Oh, yes; at some other point.

"Q. But the bill of lading from these foreign countries and states to a Colorado smelter is in the name of the owner of the ore to the American Smelting and Refining Company? A. Yes, if the owner of the ore has shipped it and drawn on the bill of lading, it is shipped by him to us.

"Q. It would necessarily be so if the bill of lading was attached, wouldn't it? A. Yes, sir.

"Q. It would be shipped in the name of the seller of the ore to the American Smelting and Refining Company? A. Of the seller of

the ore to the American Smelting and Refining Company.

"Q. And as I understand, in all these cases the value is determined where the mine is—at least, in the country where the mine is? A. Not always. It depends upon the arrangement. In the great majority of cases of foreign shipments the value is determined at the point of shipment. But in other cases it is determined here on arrival

"Q. Am I correct in the understanding that ores are shipped to the Colorado smelters from South America? A. Yes, sir.

"Q. British Columbia and Old Mexico? A. Yes, sir.

"Q. And several of the states which you have mentioned, and territories? A. Yes, sir; that is right.

(Second Method.)

"Q. And I also understand you that from some of the states the owners of the ore ship direct to the smelters? A. They do.

"Q. And you determine the value at the smelters? A. Yes, sir.

"Q. And then pay for it there? A. Pay for it here.

"Q. Pay for it here at the smelter. In that case the value of the ore is determined at the smelters in Colorado? A. Yes, sir."

When the ore is purchased in a foreign state Mr. Guiterman says it is shipped in the name of the seller

with the draft attached to bill of lading. The acceptance of this draft at the smelter and its payment completes the sale at the smelter. In the the other instance, where the mine ships direct to the smelter, the value of the ore is determined and the purchase made at the smelter. In either case the transfer of title is made at the smelter.

After the ore is treated, the product is shipped out of the state by the company to its refineries for further treatment. The consignor in this case is the American Smelting and Refining Company.

Mr. Guiterman further testified that the proportion of the Colorado property to the whole property is somewhere between ten and twenty per cent. of the whole; that the value of the plants in Colorado is close to $5,000,000 (folio 89, Record), while the assignments of error signed by the general counsel of the company adopts twenty per cent. (No. 29, page 68, Record.)

The company owns smelters and mines outside of Colorado, but no mines in Colorado. (Folios 89 and 93 of Record.)

Mr. C. W. Waterman testified for the company substantially as follows: That the company, previous to entering into business in the state of Colorado, complied with all the laws of the state.

NATURE OF THE TAX.

Counsel for plaintiff in error endeavored to have the annual state corporation license tax construed as a property tax, and then assail it, because,

as such property tax, they maintain it violates several provisions of the state and federal Constitutions.

The act of 1902 was an effort to increase the revenue of the state of Colorado and make the burden of the support of the state government fall upon new subjects of taxation, as the act afforded no reason for its creation unless such was the intent of its framers. For a general review of this act, discussing its purpose and construction, we refer to

Parsons vs. People, 32 Colo., 221.
Brown vs. Elder, 32 Colo., 527.

The revenue act of 1902 first provides for a tax upon all property real and personal; it then provides for a license tax upon liquor dealers; next a license tax upon the right to succeed to the property of a testator or intestate. After these, provision is made for the valuation of the intangible property of a corporation for the purpose of taxing it. We then come to the sections involved in this suit imposing a state license tax. This tax is undoubtedly assessed for the privilege of carrying on business; a corporation which is dormant does not have to pay it. The penalty shows the purpose of the law; a corporation must either pay the tax or cease to do business. It is assessed upon the face value of the stock, regardless of its value. Moreover, it is assessed upon the entire amount of the capital stock, whether it is invested in the state or outside of it.

The rate of taxation is different from that upon property, and shows that the legislature did not have the idea of property in view when it required the tax.

Section 65 reads as follows:

"Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the state of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the 1st day of May of each year, or at the time of obtaining such right or privilege, and on or before the 1st day of May of each year thereafter, as the case may be, to the auditor of the state of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

If we are to hold that this statute levies a property tax, it is because it is a franchise tax, and we have seen that all franchises of a corporation adding anything to its value are covered by previous sections of the act. Double taxation of property is not permissible in Colorado.

Board of Co. Comrs. vs. Wilson, 15 Colo., 90, 96.

It is not reasonable to presume that the legislature was in ignorance of the limitations in the Con-

stitution concerning taxation, and a review of the entire act shows that the intention of the legislature was to reach several new subjects of taxation in Colorado.

Counsel claim that the following sections of the state revenue act make the tax prescribed in section 65 a property tax:

> "Section 13. Whenever the terms mentioned in this section are employed in this act, they are employed in the sense hereinafter affixed to them.
>
> "The term 'real estate' includes, first, all lands or interest in lands within the state to which title or the right to title has been acquired from or ratified by the government of the United States, or from the state; Provided, That all lands purchased under contract taken from the state shall, during the life of the contract, be taxed only on the amount paid, including the improvements thereon. Second, all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto; third, improvements.
>
> "The term 'improvements' includes all buildings, water rights, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.
>
> "The term 'personal property' includes everything which is the subject of ownership, whether tangible or intangible, and not included within the term 'real estate.'

"The term 'credit' includes every claim and demand for money, labor or other valuable thing, and every annuity or sum of money receivable at stated periods; but pensions from the United States, and salaries and payments expected for services to be rendered, are not included in the above term.

"The term 'intangible property' shall include rights, credits, franchises, special privileges and special advantages attendant upon or derivable under contract rights, having a value for the purposes of income or sale of itself, or in connection with other property.

"Section 14. Except where otherwise herein provided, the phrase 'taxable property,' as used in this act, includes real property, personal property, property that savors of both real and personal property, including rights and credits, and all intangible property as defined in the preceding section; and for the purposes of taxation it shall make no difference that the possession, use or ownership of any such property is qualified, limited, not the subject of alienation, or the subject of levy or distraint separately for the particular tax derivable therefrom; Provided, That where any property within this state is mortgaged, conveyed or pledged for the security of a loan or debt then owing, the said property and the notes, mortgage, deed of trust, trust deed, contract or other conveyance, shall be assessed as a unit, and as one and the same, and as of one value

and as the value of said property so mortgaged, pledged or otherwise conveyed only, and any such notes, mortgages, deeds of trust, trust deeds, contract or conveyance, shall not be otherwise returned or assessed.

"Section 15. All property not expressly exempt by law shall be subject to taxation. The term 'property,' as used herein, shall be held to include both tangible and intangible property."

Session Laws 1902, page 45.

Counsel for corporation claim that these sections make the privilege of doing business in the state of Colorado a property right. The intangible property, according to these statutes, includes rights, privileges, franchises, special privileges and special advantages.

When a foreign corporation files its charter in the office of the secretary of state of Colorado and complies with certain other laws governing its admission, it acquires the right to do business for a period of twenty years, subject, of course, to any law qualifying this right. This right to do business is a franchise or power.

But we insist that the corporation can not exert this right or power to do in any particular business and thus exempt the business from taxation. Business, trades or occupations are distinct subjects of taxation and are not included in sections 13 to 15, inclusive. The matters mentioned in these sections affect persons as well as corporations. No one would claim by virtue of these sections that an individual could escape paying a tax for the privilege of conducting a business, trade or profession, or that

a liquor dealer could escape paying a license tax. It is contended that sections 64 and 65 must be construed in entire disregard of the particular business in which the appellant is engaged; that these sections impose upon the corporation a tax on its abstract right to do business, separate and distinct from the actual business in which it is engaged.

A consideration of the language of those statutes does not sustain the view taken by plaintiff in error. The language of the statute is that the tax is collectible as a condition precedent to its right to do any business within the limits of this state, and the penalty is a forfeiture of this right to do business until the tax is paid.

Evidently the legislature had in mind the concrete business in which the corporation is engaged, and not the abstract power acquired by the filing of its charter. Therefore, the Supreme Court of the state of Colorado held

> "That the tax authorized by section 65 * * * is * * * a tax on the business of foreign corporations,"

and that it was levied for the purpose of state revenue.

SECTIONS 64 TO 69, INCLUSIVE, HAVE RECEIVED A REASONABLE CONSTRUCTION AND UNDER THIS INTERPRETATION THEY HAVE NO RELATION TO THE TAX IMPOSED IN OTHER SECTIONS OF THE ACT.

It is contended by plaintiff in error that intangible property "includes rights, credits, franchises, spe-

cial privileges and special advantages attendant upon or derivable from contract rights having a value for the purpose of income or sale of itself or in connection with other property."

Section 13 of the Session Laws of Colorado, 1902, page 46.

It is argued that the tax assessed in sections 64 to 69, inclusive, is, in reality, a tax upon the franchise of the corporation commonly designated and known as the power of a corporation "to do." If this interpretation is correct, then sections 61 to 63 prescribe a rule to appraise its value and it is assessed as property. For these sections of the revenue act of 1902, see appendices A. and B., respectively.

The rule is to find out the entire value of the corporation and deduct therefrom the value of the tangible property, and the difference is to be considered the value of the intangible property.

In Adams Express Co. vs. Kentucky, 166 U. S., 171, 180, this court said:

> "* * * it is plain that the legislature intended that the entire property, tangible and intangible, of all foreign and domestic corporations and all foreign and domestic companies possessing no franchise should be valued as an entirety, the value of the tangible property be deducted and the value of the intangible property thus ascertained be taxed under these provisions."

See, also,

Henderson Bridge Co. vs. Kentucky, 31 S. W., 491; *affirmed* in 166 U. S., 150.

It is unjust, therefore, to hold that sections 64 to 69 mean in reality a tax on intangible property, when sections 61 to 63, inclusive, expressly aim at this very result. It is not reasonable to suppose that the legislature intended to give a definition of property in sections 13 to 15, inclusive, which would render sections 64 to 69 meaningless and void. They are all parts of the same act enacted at the same session of the legislature, and all parts of the act should receive a reasonable construction which will allow them to stand.

Besides, sections 13 to 15, inclusive, contain only definitions, while sections 64 to 69 levy a special tax, and it would be a strange rule of construction which would allow definitions in the early part of the act to render void later sections of the same act imposing a specific tax.

Trades, occupations, professions and business are well recognized subjects of taxation, and if the legislature intended by sections 13 to 15, inclusive, to make them property and taxable as such, it would have made use of those well-known terms in those sections. The omission of them, and the enactment of sections 64 to 69 levying the tax on the right to do business within the state, make clear the intention of the legislature. The attempt of counsel to reduce the franchise "to do" of a corporation to an identity with the business in which it is engaged is not convincing. A natural person has the right "to be" and "to do," but in the case of corporations, these attributes are conferred, and are therefore taxable. But when the power "to do" of either a corporation or an individual is exerted in a specific business, the latter is taxable. The corporation has the right "to

be" in the state that creates it. It has a right "to do," under some restrictions, in every state. For instance, the West Publishing Company is selling books in every state in the Union without carrying its existence into other states, and they also enforce collections by the aid of courts. But when any particular corporation sets itself up in business in another state, it must comply with all the laws of the state concerning admission of foreign corporations. Certain privileges are enjoyable under the commerce clause of the Constitution, but this clause does not permit foreign corporations to enter a state for all purposes. What is "carrying on business" in a state, so as to render a corporation liable to pay a fee for admission, is decided in

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

The power of a corporation "to do" differs from the same power in natural persons in the respect that the charter defines what the corporations may do. With this difference, the powers are alike in natural and artificial persons. But when either puts the power in execution by starting any particular business, the latter is a distinct subject of taxation under sections 64 and 69, inclusive. The tax is assessed as a condition precedent to carrying on the business; it is the business which must cease as a penalty in case of default in the payment of the tax. The power "to do" is not taken away in case a natural person refuses to pay a tax imposed for the privilege of carrying on business; it is only suspended. The corporation acquired the right "to do" or to carry on business within the meaning of *Cooper Mfg. Co. vs. Ferguson, supra*, sub-

ject to all revenue laws then existing or which might thereafter be enacted. However, suppose the contention of counsel for plaintiff in error be correct, and that the tax imposed by sections 64 to 69, inclusive, is a property tax, it is not obnoxious to any constitutional provision of the state of Colorado or of the United States. Those sections would not be repugnant to any provisions of our Constitution. It is only when they are considered in connection with sections 61 to 63, inclusive, that an objection to one or the other arises, for the same thing would be taxed twice, once according to its value and then at an arbitrary rate.

Section 3, article X, Constitution of Colorado, provides:

> "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxing all property, real and personal, * * *."

The limitation contained in this section requires the tax to be uniform only on the same class of subjects. For instance, all mining property might be taxed in one manner, railroad property in another, and real estate and personal property in still a different way, and this constitutional provision would not be violated.

People vs. Henderson, 12 Colo., 369, 375.

The power "to do" and the business of the corporation are distinct subjects of taxation.

> "The right or privilege *to be* a corporation or *to do* business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present."
>
> Home Ins. Co. vs. New York, 134 U. S., 594, 599.
>
> Adams Express Co. vs. Ohio, 166 U. S., 185.

> "Different modes of taxation are adopted in different states, and even in the same state at different periods of their history. Fixed sums in some instances are required to be annually paid into the treasury of the state, and in others a prescribed percentage is levied on the stock, assets or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period."
>
> Home Ins. Co. vs. N. Y., 134 U. S., 594, 603.

> "The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the

powers that, under such form, the company may exercise. The distinction, although formulated by Mr. Justice Field in Horn Silver Min. Co. vs. New York, 143 U. S., 305, was not strictly adhered to in his subsequent expressions, probably because there was nothing in that case to call for a nice use of terms."

Lumberville Del. B. Co. vs. State Board, 25 L. R. A., 134, 138.

As illustrations of the method of taxing intangible property of corporations we refer to the following decisions.

"Owing to the difficulty of distinguishing between the capital and the property in which it is invested, tests for determining whether the tax is on the property or the franchises, may be regarded, generally, uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested; if the former, it is a franchise tax; if the latter, a tax upon the property."

State vs. Stonewall Ins. Co., 89 Ala., 335, 338.

So a tax upon gross receipts is a franchise tax.

State vs. Phil. W. B. R. Co., 45 Md., 361.
U. S. Pow. Co. vs. State, 79 Md., 63.

So a tax upon deposits in savings banks.

Com. vs. People's Five Cent Saving Bk., 5 Allen, 428.
Prov. Inst. vs. Mass., 6 Wall, 611.

So a yearly tax proportioned to the amount of capital stock issued and outstanding.

State vs. Heppenheimer, 54 N. J. L., 439.

So a tax upon the number of tons of coal mined semi-annually by both domestic and foreign corporations is a franchise tax measured by the quantity of coal, and not a property tax upon the coal.

Kittanning Coal Co. vs. Com., 79 Pa., 100.

So a tax upon the amount of capital employed by a foreign corporation in the state is not a property tax, but upon the privilege extended to it of doing business therein as a corporation.

People vs. Wemple, 131 N. Y., 64.

The jurisdiction to impose such tax is gained by reason of the business which such corporation is privileged to do in the taxing state under the protection of its laws.

People vs. Roberts, 159 N. Y., 70, 74.

So in New York a tax computed by a certain percentage upon capital stock measured by dividends

was held valid against a foreign corporation when it does any business whatever in the state, without regard to the amount it does, or the amount of capital it employs, or the amount of its stock held therein, or the extent of the benefit derived from, or protection afforded by, the laws and agencies thereof.

Horn Silver Min. Co. vs. N. Y., 143 U. S., 305.

So, too, in New Jersey, a yearly tax of one-tenth of one per cent. on the amount of the capital stock held not a tax upon property, but a tax by way of a license for exercising corporate franchises.

Stand. Und. C. Co. vs. Attorney General, 46 N. J. Eq., 270.

It is the price of the right and privilege it received from the state of being a corporation. Although the amount to be paid is determined by the capital stock and the duration of the corporate life, yet these are only the *criteria* chosen by the legislature for ascertaining the probable value of the corporate franchise which the company assumed. It is not a tax levied upon corporate property or business.

Honduras Co. vs. St. Bd., 54 N. J. L., 278.

Followed and approved in

State vs. State Board, 61 N. J. L., 461.

However, counsel insist that the revenue act of Colorado makes these last forms of taxation property tax. These are well recognized methods of taxing franchises of corporations, and they remain valid forms of taxation even though the legislature has

made all sorts of franchises property. The constitutional clause invoked concerning uniformity only applies to subjects of the same class.

Ames vs. People, 26 Colo., 83.

People vs. Henderson, 12 Colo., 369.

Therefore, it would be appropriate for the legislature to call all sorts of franchises property, and at the same time to assess it arbitrarily upon the entire capital stock of the corporation, or in any one of the ways above designated.

The organic act creating the territory of Dakota provides that no law

> "shall be passed impairing the rights of a private property; nor shall any discrimination be made in taxing the different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed."

McHenry vs. Alford, 168 U. S., 651, 664.

Of the same purport is the case of

Postal Tel. Co. vs. Adams, 155 U. S., 688.

The legislature passed an act requiring railroads to pay a certain percentage on the gross earnings in lieu of other taxes. The Northern Pacific Railroad owned a great deal of land in the territory of Dakota, and it was insisted that it was a mere proprietor of land, the same as a natural person.

> "Many cases are cited, in the brief of counsel, from the different states having pro-

visions in their Constitutions somewhat similar to those found in the organic act of Dakota, and in which states it has been held that the legislature is not confined to taxation in precisely the same method for all classes of property, but that it has power to classify and to provide different methods of taxation of the property so classified. The particular facts arose in, and the cases are cited from, Wisconsin, Iowa, Kansas, Louisiana, Michigan, New Jersey, Pennsylvania, Mississippi, Missouri and Illinois. They are cited in the margin.

"Upon a full consideration of the subject, we are persuaded that there is nothing in any provision of the act of 1883 for the taxation of the gross earnings which violates the letter or the spirit of the organic act."

McHenry vs. Alford, 168 U. S., 651, 669-670.

The fourteenth amendment

"does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property."

Home Ins. Co. vs. N. Y., 134 U. S., 594, 606.

In *Giozza vs. Tiernan*, 148 U. S., 657, 662, Chief Justice Fuller remarked:

"Nor, in respect of taxation, was the amendment intended to compel the state to adopt an iron rule of equality; to prevent the classification of property for taxation at different rates; or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be obtained by it. It is enough that there is no discrimination in favor of one as against another of the same class. *Bell's Gap Railroad vs. Pennsylvania*, 134 U. S., 232; *Home Insurance Co. vs. New York*, 134 U. S., 594; *Pacific Express Co. vs. Seibert*, 142 U. S., 339; And due process of law within the meaning of the amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government. *Leeper vs. Texas*, 139 U. S., 462."

Whether we view this tax as a tax on property or on business, it is constitutional, unless it leads to double taxation. The legislature had power to classify all subjects of taxation. It has a right to adopt its own method of taxing each class. We have authority for taxing corporations for the privilege of carrying on business at a fixed rate upon their entire capital stock, regardless of its face value, and no matter how little property it has in the state.

Home Ins. Co. vs. N. Y., 134 U. S., 594.

Horn Sil. Min. Co. vs. People, 143 U S., 305.

Delaware R. R. Tax Cas., 18 Wall., 231.

Cal. vs. Pac. R. R. Co., 127 U. S., 1, 41.

Weston vs. Charleston, 2 Pet., 449, 466.
State Tax on Foreign-Held Bonds, 15 Wall., 300, 319.
Kirkland vs. Hotchkiss, 100 U. S., 499.

The amount of property in the state is immaterial.
Pembina Min. Co. vs. Penn., 125 U. S., 181.
Home Ins. Co. vs. N. Y., 134 U. S., 594.

In the trial of this case in the court below, counsel labored industriously to convince that tribunal that the expression "rights," "credits," "franchises," "special privileges" and "special advantages," in some mysterious manner, included the right to carry on business, taxed in section 65. But this is not the plain and obvious meaning of the statute.

In my judgment, these terms refer to something entirely different. For instance, a contract may become a subject of taxation, because it is an element of great value. Some express company may obtain a contract over a particular railroad and thus add to the wealth of the company. The Wells Fargo has a special charter obtained from the territory of Colorado. It is perpetual and allows that company to do almost any business, and is therefore of special value. In an early day, the city of Pueblo granted the Atchison, Topeka & Santa Fe Railway a right of way over certain streets. The growth of the city has extended far beyond these, and as a result this road possesses franchises of immense value. The Denver & Rio Grande Railroad, after a legal battle with the Atchison, Topeka & Santa Fe, obtained the right of way through the Royal Gorge in Colorado. It admits of only one road through the canon. This is by far the

best passage through the Rocky Mountains, and therefore the Denver & Rio Grande has a special advantage in the particular right thus obtained. Many other illustrations could be given to indicate the meaning and purpose of these phrases used in section 13 of our own act, but it is not necessary to extend the list.

Sections 13 to 15, inclusive, do not contain anything which requires the tax assessed by sections 64 to 69, inclusive, to be construed as a property tax. Even if the former sections did require such construction, the tax would not be unconstitutional as a property tax, for the reason that the legislature has the right to place that kind of property in a class by itself, and tax it by any just method. Many well recognized ways have been cited. But the construction of the Supreme Court of Colorado is reasonable and the operation of the law does not violate any provision of the federal Constitution, and, therefore, the rule adopted in this court will allow the interpretation of the highest court in the state to stand. Moreover, the rule in sections 61 to 63 for valuing the intangible property is worthless if the tax levied by section 65 is on the franchise or intangible property.

DECISION OF STATE COURT FINAL AS TO CONFLICT BETWEEN STATUTE AND STATE CONSTITUTION.

The decision of the Supreme Court of the state of Colorado is conclusive in this court as to any question of conflict between the statutes in controversy and the state Constitution.

Metropolitan St. Ry. Co. vs. N. Y., 199 U. S., 1, 35.

Adams Express Co. vs. Ohio, 165 U. S., 194, 219.

Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232, 236.

Merchants' Bank vs. Penn., 167 U. S., 461, 462.

The decision in this case will be found in 34 Colo., 240, or 82 Pac., 531.

WHEN A STATE STATUTE IS ALLEGED TO INFRINGE SOME PROVISION OF THE FEDERAL CONSTITUTION, THE INTERPRETATION OF THE HIGHEST JUDICIAL TRIBUNAL OF THE STATE WILL BE ACCEPTED UNLESS, AS A MATTER OF FACT, THE STATE STATUTE, IN ITS OPERATION, VIOLATES SOME PROVISIONS OF THE FEDERAL CONSTITUTION.

When the matter comes before the Supreme Court on writ of error to the highest court of the state, only the federal question can be considered, and the court, in considering that question, is concluded by the construction of the state statute by the state court.

The legislature of Alabama passed a certain statute regulating the sale of fire and marine insurance within the state by companies not incorporated therein. It required such companies to pay annually into the treasury the sum of one hundred dollars. These statutes came before the Supreme Court of the United States in *Noble vs. Mitchell*, 164 U. S., 367.

Justice White, in concluding the opinion, at page 372, said:

> "This construction of the Alabama statute, although made by the Supreme Court of that state, it is urged is erroneous, and we are invited to disregard it; but manifestly the interpretation of a statute of the state of Alabama by the Supreme Court thereof under the circumstances here presented is binding on us."

It was charged that the statute violated the commercial clause and section 2, article IV of the Constitution, guaranteeing that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states."

The Supreme Court of Alabama, in interpreting the statute, held that the provision as to foreign corporations was distinct and separable from those concerning associations or partnerships. This court, therefore, refused to construe the statute, and held that the language, as interpreted by the state court, did not embrace partnerships or associations of persons, and that the practical operation given the statute in Alabama made it applicable to and enforceable against only foreign corporations.

On the other hand, in the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, this court refused to accept the construction given certain ordinances of the city of San Francisco, because the practical effect and operation of these ordinances was to infringe upon certain provisions of the fourteenth amendment to the Constitution.

The state court held that these ordinances vested the board of supervisors with the power to withhold their assent to the use of wooden buildings as laundries in certain cases, with a view to the protection of the public against the dangers of fire. This court said:

> "There is nothing in the ordinances which points to such a regulation of the business of keeping and conducting laundries. * * * The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."
>
> Yick Wo vs. Hopkins, 118 U. S., 356, 366.

As to whether the statute under which plaintiff in error filed a certified copy of its articles of incorporation constitutes a contract, exempting the corporation from the particular tax prescribed by section 65, this court will interpret that statute with a view to determine what the contract really is. But if the construction given to section 65 does not give to this statute a meaning which violates some provision of the federal Constitution, the interpretation will not be disturbed.

Justice Marshall has said:

> "The judicial department of every government where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus no

court in the universe which proposed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding. We receive the construction given by the courts of the nation as the true sense of the law, and feel ourselves no more at liberty to depart from that construction than to depart from the words of the statute. On this principle, the construction given by this court to the Constitution and laws of the United States is received by all as the true construction; and on the same principle the construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws or treaties of the United States."

Elmendorf vs. Taylor, 10 Wheat., 152, 159.

We quote from Justice McLean as follows:

"The decision of the highest judicial tribunal of a state should be considered as final by this court, not because the state tribunal in such a case has any power to bind this court, but because, in the language of the court in *Shelby vs. Guy*, 11 Wheat., 361, a fixed and received construction by a state in

its own courts makes a part of the statute law."

Green vs. Neal's Lessee, 6 Pet., 291, 298.

Chief Justice Fuller said:

"It is well settled that, upon the construction of the Constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, unless they conflict with or impair the efficacy of some provision of the federal Constitution or of a federal statute or a rule of general commercial law. *Norton vs. Shelby County*, 118 U. S., 425, 439; *Gormley vs. Clark*, 338, 348."

Stutsman County vs. Wallace, 142 U. S., 293, 306.

In *Noble vs. Mitchell*, *supra*, at page 372, Justice White said:

"* * * * when the statute is attacked upon constitutional grounds, it is our duty to avoid such a construction, if it can be done consistently, as will defeat the entire legislation of the state upon questions embraced in these statutes relating to insurance companies."

The following cases are also in point:

Osborne vs. Florida, 164 U. S., 650, 654.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S., 112, 154, and citations.

Burgess vs. Seligman, 107 U. S., 20, 33.

Under the Constitution of the state of Colorado the legislature had the power to impose a business tax, and the highest court of the state has said this is the effect and meaning of the statute. The result inevitably follows that this construction of the statute should stand.

THE CONSTITUTIONAL PROVISIONS OF THE STATE CONCERNING UNIFORMITY AND LIMITATION OF TAXES APPLIES ONLY TO AD VALOREM TAX ON PROPERTY.

The portion of the state Constitution restricting the legislature in the imposition of taxes is found in article X of the state Constitution.

Our Supreme Court has held in four different cases that this article refers only to *ad valorem* tax on property.

Denver City Ry. Co. vs. Denver, 21 Colo., 350.

Parsons vs. People, 32 Colo., 221.

A. S. & R. Co. vs. People, page 57, record

Brown vs. Elder, 32 Colo., 527.

The point involved in the case of *Denver City Ry. Co. vs. Denver, supra*, was the power of the municipal corporation to assess the street railway company a

tax of ten dollars per annum for each street car it used to carry passengers.

In the case of *Parsons vs. People, supra*, the question involved was the authority of the state to collect a tax of twenty-five dollars from each drug store which sells liquor.

In these two cases, the tax was held to be an occupation or business tax, and not a license tax for police regulation.

Brown vs. Elder, supra, relates to inheritance tax.

THE STATUTES UNDER WHICH THIS CORPORATION WAS REQUIRED TO PAY A FEE FOR FILING A CERTIFIED COPY OF ITS ARTICLES OF INCORPORATION DO NOT CONSTITUTE A CONTRACT OF EXEMPTION FROM ANY FORM OF TAXATION.

Counsel seek to establish the proposition that the payment of the filing fee to the secretary of state and its acceptance made a contract between the state and the corporation whereby the latter obtained the right to do business within the state for a period of twenty years, exempt from any form of corporation tax except a tax on its property.

On the 28th day of April, 1899, the plaintiff in error filed a certified copy of its articles of incorporation with the secretary of state. It was then capitalized for $65,000,000, and paid for this filing the fee of $9,792.50. The law in force then was the act of 1897, found in chapter 51 of the Session Laws of that year. This act reads as follows:

"Section 1. Every corporation joint-stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint-stock company or association, is authorized to have, does not exceed fifty thousand dollars; but, in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association or charter of said incorporation, joint-stock company or association, in the office of the secretary of state; and, no such corporation, joint-stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock com-

pany or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes.

"Section 2. Any foreign corporation doing business in this state, that has, since the filing of its certificate in this state, increased its capital stock, without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this act, and it is hereby made the duty of the secretary of state to at once cause action to be brought against any foreign corporation for recovery of such fees, and a certified copy of the certificate of such increase, on file in any foreign state, shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of *quo warranto* shall lie against any foreign corporation to test its right to exercise corporate franchises in this state.

"Section 3. The secretary of state shall not file or record in his office any certificate of paid-up stock, certificate of impression of corporate seal or other paper of any corporation or association, nor issue any certificate to any corporation or association unless the articles of incorpation of said company are already on file in his office, nor unless all fees prescribed by this act shall have been paid."

In 1901, the capital stock was increased to $100,000,000. On the 17th day of May, 1900, the company filed with the secretary of state a certified copy of this amendment and paid therefor a fee of $5,250. The law in force at that time was the act of 1901, in relation to corporations, and is found in chapter 52 of the Session Laws of that year. The sections that are relevant to this issue are sections 4 to 10, inclusive. They read as follows:

> "Section 4. Every corporation, joint-stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or any state or territory of the United States, beyond the limits of this state, having a capital stock divided into shares, shall pay to the secretary of state, for the use of the state, a fee of thirty dollars in case the capital stock which said corporation, joint-stock company or association is authorized to have, does not exceed fifty thousand dollars; but in case the capital stock thereof is in excess of fifty thousand dollars, the secretary of state shall collect the further sum of thirty cents on each and every thousand dollars of such excess, and a like fee of thirty cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association or charter of said corporation, joint-stock company or association in the office of the secretary of state, and no such corporation,

joint-stock company or association shall have or exercise any corporate powers or hold or acquire any real or personal property, franchises, rights or privileges, or be permitted to do any business or prosecute or defend in any suit in this state until the said fee shall have been paid.

"Sec. 5. Any foreign corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, that has since the filing of its certificate in this state, increased its capital stock without paying the fees prescribed by the law of this state at the time of such increase, or that shall hereafter increase its capital stock, shall be liable to pay the fees prescribed by this act, and it is hereby made the duty of the secretary of state to at once cause an action to be brought against any foreign corporation, joint stock company or association for the recovery of such fees, and a certified copy of the certificate of such increase on file in any foreign state shall be sufficient evidence to sustain a judgment for the amount of such fees, and an action in the nature of a writ of *quo warranto* shall lie against any foreign corporation, joint stock company or association to test its right to exercise corporate franchises in this state, while so in default in payment of such fees.

"Sec. 6. Whenever any corporation, joint stock company or association, incorpor-

ated by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, shall file with the secretary of state of this state certified copies of the general law of any foreign state or country, duly certified and authenticated by the proper authorities of such state, country or territory, as provided in general section 261 of the General Statutes of Colorado, 1883, the same being section 500 of Mills' Annotated Statutes of Colorado, such corporation, joint stock company or association shall pay to the secretary of state for the filing thereof, a fee of five dollars.

"Sec. 7. Whenever any such corporation, joint stock company or association, incorporated by or under any general or special law of any foreign state or kingdom, or of any state or territory o. the United states, beyond the limits of this state, shall file with the secretary of state a certificate designating its principal place of business or agent for the service of process, it shall pay to the secretary of state for the filing thereof, a fee of five dollars.

"Sec. 8. The secretary of state shall not file or record in his office any certificate of paid-up stock, certificate of impression of corporate seal, annual report or other paper of any corporation, joint stock company or association, nor issue any certificate to any corporation, joint stock company or association unless the articles of incorporation of said

company are already on file in his office, nor unless all fees prescribed by this act shall have been paid.

"Sec. 9. The secretary of state shall exact a fee of two dollars and fifty cents for filing and recording each certificate of impression of the corporate seal of any corporation, and a fee of two dollars and fifty cents for filing and recording each certificate of paid-up stock of any corporation; Provided, however, That where such certificate of paid-up stock shows that the capital stock of such corporation is in excess of fifty thousand dollars, that such corporation, joint stock company or association shall pay a further fee of five cents per thousand upon each thousand dollars of capital stock in excess of fifty thousand dollars for the filing and recording of said certificate of paid-up stock.

"Sec. 10. No corporation, joint stock company or association incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock

company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

Section 3, article XV, of the Constitution of the state of Colorado provides as follows:

"The general assembly shall have the power to alter, revoke or annul any charter or incorporation now existing and revocable at the adoption of this Constitution, whenever in their opinion it may be injurious to the citizens of the state, in such manner, however, that no injustice shall be done to the incorporators."

Section 9, article X, of the Constitution of Colorado provides:

"The power to tax corporations and corporate property, real and personal, shall never be relinquished or suspended."

Our legislature has wisely provided, as part of the act concerning corporations:

"The general assembly may, at any time, alter, amend or repeal this act, and shall at all times have power to prescribe such regulations and provisions as it may deem advis-

able, which regulations and provisions shall be binding upon any and all corporations formed under the provisions of this act; and, Provided, further, That this act shall not be held to revive or extend any private charter or law, heretofore granted or passed concerning any corporation."

Section 634, M. A. S.

This statute was adopted in 1877, and is found in the General Laws of that year.

On the 31st day of May, 1901, the secretary of state executed and delivered to the plaintiff in error a certificate of authority pursuant to section 491i, volume 3, M. A. S., Revised Supplement.

This document reads as follows:

"State of Colorado.

"Office of the Secretary of State.

"CERTIFICATE OF AUTHORITY.

"I, David A. Mills, secretary of state of the state of Colorado, do hereby certify that the American Smelting and Refining Company, under and by virtue of the provisions of 'An act relating to corporations, and prescribing certain fees to be paid by corporations, foreign and domestic, and to repeal certain acts and all acts, and parts of acts, in conflict herewith, approved April 6, 1901,' have made, signed, acknowledged, and this twenty-eighth day of April, A. D. 1899, at the hour of 11:30 o'clock a. m., filed in my office their certificate of incorporation.

"Now, therefore, pursuant to the provisions of section 10 of said act, I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the secretary of state, and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law.

"In testimony whereof I have hereunto set my hand and affixed the great seal of the state, at the city of Denver, this twenty-first day of May, A. D. 1901.

(Seal of the state of Colorado.)

"DAVID A. MILLS,

"Secretary of State."

A copy of the statute authorizing the issuance of this certificate is found in the appendix at "C."

Two propositions are made plain by a consideration of these statutes and the constitutional provision cited: First, there is no suggestion of an exemption from taxation in any statute bearing upon the filing of the certified copy of the articles of incorporation. Second, the constitutional provision prohibits the legislature from exempting a corporation from any form of taxation.

The charter may constitute a contract between the state granting it and the company. Even if it contain a clause exempting it from taxation in the parent state, the filing of a certified copy in another state would not constitute a contract of exemption. The fact that an additional tax is imposed on a person or corporation is not a change or alteration of the contract. Among the laws most likely to be enacted

after its creation were those changing and altering the revenue laws, adding new subjects of taxation, or changing the burden of existing revenue laws. The general statute reserving the right in the legislature to amend or repeal the laws pertaining to corporations is constitutional. But the right to change the revenue laws exists regardless of this statute or constitutional provision.

Griffin vs. Ins. Co., 1 Am. Corp. Cases, 530.
Tomlinson vs. Branch, 15 Wall., 460.

We have seen that the right to do business is subject to taxation. If we are right in this assertion, then the Constitution prohibits the legislature making any contract of exemption with corporations. This provision of the Constitution, in my judgment, effectually disposes of the contention of plaintiff in error. The legislature can not make a contract with a corporation, express or implied, that would exempt it from any of the ordinary forms of taxation. We believe that the authorities abundantly demonstrate that corporations are subject to a tax upon their property, real and personal, upon their franchises, and upon the privilege of carrying on business. A corporation may also be required to pay a tax for its shareholders upon the stock owned by them. If a person is liable to pay a tax for the privilege of carrying on business, a corporation is subject to the same form of taxation. If the legislature, at the time of admitting this corporation, had not seen fit to tax the business carried on by the corporation, there is certainly no contract agreeing never to resort to this form of taxation. If the legislature had attempted to exempt it from any

kind of taxation, the act would be void, because of the constitutional provision cited. A corporation claiming to be exempt from any form of taxation must show a clear and unequivocal provision to that effect, either in its charter or under the general law under which it is incorporated.

Ohio Trust Co. vs. Debolt, 16 How., 416.

Delaware R. R. Tax Case, 18 Wall., 206.

North. Missouri R. R. Co. vs. Maguire, 20 Wall., 46.

Metropolitan St. Ry. Co. vs. N. Y., 199 U. S., 1.

Wells vs. Savanah, 181 U. S., 531.

Bank vs. Billings, 4 Pet., 514.

Memphis Gas Co. vs. Shelby Co., 109 U S., 398.

In *Wells vs. Savanah, supra*, at page 539, the court said that a contract of exemption from taxation must not only be founded upon a consideration, but it must be clearly stated, and will not be inferred from facts which do not irresistibly point to the existence of a contract.

The revenue act of 1901 and the revenue act of 1902 make it plain that the legislature did not intend the fee paid to the secretary of state to stand in lieu of the frachise tax or a tax on business. The Session Laws of 1901 contain an act concerning the fees to be paid for the organization of corporations and the admission of foreign corporations. Then, in the same volume, we have the revised revenue act of 1901, which was re-enacted in 1902 without material change, be-

cause of the failure of the legislature to pass it constitutionally in the previous year.

The fee which the American Smelting and Refining Company would be required to pay under the present law would be $30,015. But under the law of 1897 and that of 1901, which were in force at the time of the filing of its articles of incorporation, the fee was $15,002.50.

Now, we will assume that if the people of the various states are willing to allow persons to form themselves into gigantic corporations, then it is just and proper that the latter should pay at least as much on the dollar for this privilege as the small concerns are required to pay. These corporations are merely availing themselves of a law which did not have them, or similar organizations, in view when it was framed, and if the latter have power to take advantage of the law on equal terms with small corporations, they should at least have the good grace to do so, without seeking to import to the law a new and different construction than was intended by its framers. There is no extra force to be implied from the size of the fee when we observe the magnitude of the larger corporation, and know that it pays only the same proportionate fee as the smaller concern pays.

It was entirely optional with this company whether it should incorporate for one hundred millions of dollars or five millions. Mr. Guiterman testified on the stand that the entire smelting plant of the American Smelting and Refining Company in the state of Colorado could be duplicated for the latter sum, but, for some reason or other, this company has seen fit to enlarge its scope and swell its capital

until it has been able to dominate the entire smelting industry of the United States. It would not be to its advantage to have separate corporations for different states. That plan would not control the smelter business. It, therefore, pays for the advantage which it enjoys, but it should be content to limit the payment to that one object. Indeed, the profit arising from the sale of watered stock is confined to those corporations which issue an enormous volume of stock. There is every reason why these corporations should pay a very much larger fee for the privilege of filing their articles and deriving from the government the vast power which they enjoy than the smaller concern which is organized for the beneficial protection of those who are fairly and honestly conducting a private business under the protection of a corporation.

The fee which a foreign corporation pays to file its articles in a state is analogous to the filing fee paid by a domestic corporation. Appellant contends that this is a purchase price and that the state has sold something. This is purely an assumption, and not a single authority is cited to sustain it. The case at bar is not like those corporation cases referred to by counsel, where the state, impelled by the necessity of raising revenue, and expressly avowing its intention, has sold a franchise for the purpose of raising certain revenue, and inserted a clause of exemption from other taxation as an inducement to the buyer.

We are now confronted with something entirely different. The legislature has enacted certain general statutes which are merely ordinary laws controlling the formation of corporations, and there is no sale expressed in the terms of any of these statutes.

An ordinary corporation with a capital of one million dollars would pay only a trifling fee for the privileges granted under these statutes. If the ambition of modern promoters is driving them to the formation of colossal organizations, with an accumulation of capital that would have been incredible to the business man of a quarter of a century ago, and the organization has been attained under the simple and ordinary statutes of the state, it is vain to contend that, because the fee aggregates a large sum, something has been purchased from the state, when, in truth, the state has never had in mind the sale of anything. The charge being simply an ordinary fee for filing the papers, as in ordinary cases, the rule is not different if the capital stock is increased until the fee becomes large.

There is an obvious distinction between the charter of a corporation or the general statutes under which corporations file their articles, which are legislative in character and subject to alteration, amendment or repeal in pursuance of the Constitution and statutory provisions; and business contracts, or franchises, entered into between corporations and the state or municipality. The latter is protected by all the provisions of the federal Constitution, the same as a contract between two natural persons. But articles of incorporation filed under the constitutional provisions and statutes, such as we have cited in Colorado, are legislative in character and are subject to change from time to time.

Walla Walla vs. W. W. W. Co., 172 U. S., 1.

Joplin vs. Light Co., 191 U. S., 150.

Where the business contract between the corporation and the state or city clearly exempts the company from any burden of taxation, the exemption will be enforced, and no subsequent statute can impair the contract. There are many decisions of this character which lay down the doctrine that the original sum paid for the franchise exempts the company from any further burden of taxation, but these cases are easily distinguished from the one before us.

A TAX MEASURED BY A FIXED PER CENT. ON THE CAPITAL STOCK OF A CORPORATION FOR THE PRIVILEGE OF CARRYING ON BUSINESS IS NOT AN ILLEGAL DISCRIMINATION, BECAUSE NATURAL PERSONS ARE NOT LIABLE FOR SUCH TAXES.

Sections 64 to 69, inclusive, are said to violate the equality clause of the fourteenth amendment, because it is declared that corporations pay a tax for the privilege of carrying on business, while natural persons are not required to bear this burden. It is assumed that corporations and natural persons carry on business under the same circumstances and conditions. Herein lies the distinction, in our opinion.

Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27, 31, said that the fourteenth amendment, in declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws, meant that

> "no impediment should be interposed to the pursuits of any one, except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon the one than are laid upon others in the same calling and condition."

We believe there are essential differences between the person who carries on a business and the corporation which carries on a business. The most noticeable distinction is the capacity of a corporation to do business in an adopted name, to sue and be sued in that name, the power of succession and perpetuation, the facility with which natural persons can enter or retire from the company without interference with the continuation of the business, and the exemption of this artificial person from many liabilities to the government and public which the individual must bear. For instance, every citizen is liable to jury and military duty; also he may be compelled to serve as a member of a *posse comitatus*, and is generally required to pay a poll tax. The entire property of an individual is liable for the debts of the business he carries on. Moreover, his future acquisition may be levied upon to pay his debts, while an insolvent corporation usually winds up its affairs and becomes extinct. The right to do business in the name of a corporation, to elect directors, to do business through a manager, president or other officer; to issue stock and sell it, and in this manner to raise money for promoting an enterprise—these are all benefits conferred by the state upon a corporation, and they are among the valuable powers acquired by incorporating, which have gone so far toward making corporations numer-

ous. In some instances the individual is liable to imprisonment for violation of law committed in the conduct of his business, while a corporation, for the same offense, is liable only to a fine.

> "Considering that corporations have privileges and franchises from the state which individuals do not possess, they may be taxed differently from individuals and by a different process."
>
> Brannon on the Fourteenth Amendment, page 340.

> "An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held in artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in *Adler vs. Whitbeck*, 44 Ohio St., 539, and was there applied to the liquor traffic, because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals."
>
> So. Gum Co. vs. Laylin, 66 Oh. St. Rep., 578, 595.

I quote from the opinion of Justice McKenna in *Magoun vs. Ill. T. & S. B.*, 170 U. S., 283, 294:

> "And Mr. Justice Brewer, in Gulf, Colorado & Santa Fe Ry. vs. Ellis, 165 U. S., 150,

> 165, after a careful consideration of many cases, said: 'It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.'"

A law estimating the value of express companies and railroads within a state by arriving at the value of the whole plant as a unit and apportioning to the state an amount in proportion to its mileage within the state, is not an unjust discrimination, or a violation of the rule of classification, although different from the method of valuing other property within the state.

> Adams Express Co. vs. Ohio, 165 U. S., 194.
>
> American Express Co. vs. Indiana, 165 U. S., 255.

It is true that

> "There is nothing to forbid the classification of property for purposes of taxation and the valuation of different classes by different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impar-

tially to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroads and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose."

Kentucky Railroad Tax Cases, 115 U. S., 337.

Colorado has provided by law that mining property shall be valued for the purpose of taxation at twenty per cent. of the gross output.

People ex rel. vs. Henderson, 12 Colo., 369.

Also has classified mining property into non-producing, those that produce $1,000 or less, and those that produce over $1,000, and the last two are taxed very differently.

People ex rel. vs. Henderson, 12 Colo., 369.

"Nor is the objection tenable that the statute, in imposing such tax, conflicts with the last clause of the first section of the fourteenth amendment of the Constitution of the United States, declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws. It is con-

ceded that corporations are persons within the meaning of this amendment. It has been so decided by this court. Pembina Cons. Silver Co. vs. Pennsylvania, 125 U. S., 181. But the amendment does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected. Under the statute of New York all corporations, joint stock companies and associations of the same kind are subjected to the same tax. There is the same rule applicable to all under the same conditions in determining the rate of taxation. There is no discrimination in favor of one against another of the same class."

Home Ins. Co. vs. N. Y., 134 U. S., 594, 606-607.

A revenue statute which places railroads, express companies and telegraph companies in one class for the purpose of levying a tax in a form peculiar to such corporations, was held not to violate the clause of federal Constitution concerning equal protection.

Adams Express Co. vs. Ohio, 165 U. S., 194.

In *Home Ins. Co. vs. New York*, 134 U. S., 594, and *Horn Silver Mining Co. vs. N. Y.*, 143 U. S., 306, a statute imposing a tax on the corporate franchise, or the business of every corporation, joint stock company or association, to do business in the state, was sustained.

An examination of these cases shows that the individual may conduct a business without liability for the same tax.

McHenry vs. Alford, 168 U. S., 651, 673, decided that railroads might be assessed and taxed on property in one manner and individuals in another. In this case it was held that the property of railroads, including large grants of land from the government, might be classified by itself for the purpose of taxation.

In *Postal Telegraph Co. vs. Adams*, 155 U. S., 688, it appears the tax required to be paid by the telegraph companies in Mississippi was three thousand dollars on each telegraph company operating within the state one thousand miles or more of wire, and on each telegraph company operating less than one thousand miles of wire, a tax of one dollar per mile, and the tax thus levied was in lieu of other state, county and municipal taxes.

Chief Justice Fuller, in rendering the opinion, said:

> "The act, in prescribing the ascertainment of the charge as to telegraph companies operating less than one thousand miles of wire, was directed to reach a reasonable commutation of the amount which the company would be compelled to pay if the taxation were *ad valorem*. The taxation was neither arbitrary nor discriminating * * *."

Postal Tel. Co. vs. Adams, supra, 698.

In this case the tax was imposed only on corporations owning and operating telegraph lines in the state, and a great difference was made between lines consisting of a thousand miles or more, and those consisting of less mileage.

For the purpose of levying a tax on the business of corporations the statute of Colorado divides them into two classes—domestic and foreign—and imposes upon the members of each class a tax which is uniform as to all the constituents. It is sufficient that the tax imposed is uniform and equal as to all the members of the class upon which it operates.

State Railroad Tax Cases, 92 U. S., 575, 611.

People vs. Henderson, 12 Colo., 369.

In 1879 the state of Pennsylvania passed an act requiring all foreign corporations, with certain exceptions, to pay into the state treasury one-fourth of a mill on each dollar of the capital stock.

The constitutionality of this act was contested and the tax sustained in *Pembina Min. Co. vs. Penn.*, 125 U. S., 181.

Section 64 levies a tax of two mills on each thousand dollars of the capital stock of domestic corporations, while section 65 levies a tax of four mills on each thousand dollars of the capital stock of foreign corporations.

It is claimed by plaintiff in error that this is an arbitrary discrimination between foreign and domestic corporations and is in violation of the provision of the fourteenth amendment of the federal Constitution, which prohibits any state from depriving any person within its jurisdiction of the equal protection of the law. It has been held that a corporation is a person within the meaning of this provision. It is also claimed that this classification is in violation of the fourteenth amendment because it violates the clause of the Constitution guaranteeing to the citizens of each state all the privileges and immunities of the citizens in the several states.

As to the latter clause, corporations are not citizens within its meaning.

> Pembina Min. Co. vs. Penn., *supra*.
>
> Paul vs. Virginia, 8 Wall., 168.

Mr. Justice Field said:

> "The equal protection of the law which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires

is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided, always, such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states, the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character."

Pembina Min. Co. vs. Penn., *supra*, page 189.

But it is asserted by plaintiff in error that it has been admitted into the state of Colorado and has paid the regular fee for that purpose and has obtained

the privilege of doing business in the state for twenty years, and that, therefore, it is entitled to the equal protection in carrying on its business which other corporations or persons similarly situated, enjoy. For instance, a domestic corporation may carry on smelter business and pay only two cents on each thousand dollars of its capital stock.

> "The power of the state to discriminate between her own domestic corporations and those of other states, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Augusta vs. Earle*. As to the nature or degree of discrimination, it belongs to the state to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."
>
> Ducat vs. Chicago, 10 Wall., 410, 415.
>
> Copper Co. vs. Scherr, 50 W. Va., 533, 551.
>
> State vs. Underground Cable Co., 18 Atl. R., 581.
>
> Augusta vs. Earle, 13 Peters, 519.

A foreign corporation admitted to do business in another state is subject to all the powers of taxation which may be exercised. The state has a right to select such subjects of taxation as it deems best, and among these are business and occupations. The state possesses the further right to classify when it fixes this tax. The only limitation upon this power is the

prohibition against the arbitrary exercise of it. Corporations may be classified in accordance with the business they transact.

On the other hand, they may be aggregated into those which are domestic and those which are foreign, if there is any just discriminating principle distinguishing them. When a corporation is admitted to do business in another state, it does not cease to be foreign. It still possesses the right, when sued, in this state, to demand a transfer of the suit to a federal court, because it is a foreign citizen. The question, therefore, remains to be determined, if the element of foreign citizenship is a just and reasonable basis of classification for revenue purposes. There are positive objections to the entrance of foreign corporations into a state, and it is only the exercise of reasonable discretion on the part of the legislature to assess an additional tax for this additional burden. The objection, as well as the advantage, of foreign corporations entering another state, is well illustrated in the case of the American Smelting and Refining Company. It would not be to its advantage to have separate corporations for different states; that plan would not control the smelter business. If separate corporations were employed, an unlawful combination would have to be effected in order to obtain the monopoly. It is well understood that these great corporations, controlling one entire business in different states, is a menace to the enforcement of law, and the attainment of wholesome legislation. They become a burden to the body politic.

The power which foreign corporations acquire of doing business in another state enables them to gain control of that particular business in various states,

and in this respect the people are exposed to the danger of gigantic corporations which, in their operations, amount to the same thing as trusts. A corporation has been able to gain control of an entire business by means of the laws of the various states allowing it to enter and do business. It gains a decided advantage over domestic corporations. Of course, every corporation is domestic in some state, but the privilege of migrating to other states, as we have endeavored to illustrate, confers the advantage pointed out. Those which avail themselves of it obtain the special benefit and power.

Moreover, the business is conducted by a foreign citizen; the charter is the gift of another state, and is under its control; a foreign corporation is represented only by an agent, appointed pursuant to law. If foreign corporations are dealt with on an equal basis with domestic corporations, all the business carried on in the state might fall into the hands of foreign corporations, and the state would be at the disadvantage of having her property owned and her business conducted by artificial persons, entirely beyond the limits of her jurisdiction. We think, therefore, that this classification for revenue purposes is reasonable and just. Those decisions which apply to unjust discriminations between natural persons are not in point.

The opinion of Chief Justice Field, in *Barbier vs. Connolly*, 113 U. S., 27, 31, is usually referred to as the best exposition of what is meant by that clause of the fourteenth amendment guaranteeing to persons the equal protection of the law.

"The fourteenth amendment, in declaring that no state 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace,

morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some, and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Id., 27, 31.

"Is the act open to this criticism? The clause of the fourteenth amendment especially invoked is that which prohibits a state denying to any citizen the equal protection of the laws. What satisfies this equality has not been, and probably never can be, precisely defined. Generally, it has been said that it 'only requires the same means and methods to be applied impartially to all the constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.'"

Magoun vs. Ill. T. & S. B., 170 U. S., 283.

Kentucky Railroad Tax Cases, 115 U. S., 321, 337.

Billings vs. Illinois, 188 U. S., 97.

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 94.

Missouri Railroad Co. vs. Mackey, 127 U. S., 205.

We believe there is a clear distinction between the power to classify for the purpose of raising revenue, and the right to discriminate between persons and corporations in declaring certain acts criminal. This distinction is well illustrated in the following citation:

"A state may, in its wisdom, classify property for purposes of taxation, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade

rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with domestic trade. In prescribing regulations for the conduct of trade, it can not divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of the government, and, at the same time, indirectly to build up or protect particular interests or industries. It is quite a different thing for the state, under its general police power, to enter the domain of trade or commerce and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute, making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

Connolly vs. Union Sewer Pipe Co., 184, U. S., 540, 562.

Cotting vs. Kansas City Stock Yards Co., 183 U. S., 79 .

It is also claimed that there is an unjust and illegal discrimination in the exemption of corporations having less than twenty-five thousand dollars capital. This contention is effectually disposed of in

Magoun vs. Ill. T. & S. Co., 170 U. S., 283.
Billings vs. Illinois, 188 U. S., 97.

Then plaintiff in error complains that there is an unreasonable discrimination in the classification of foreign corporations. A portion of section 65 provides as follows:

> "Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as such tax at the rate of two and one-half cents per thousand shares."

The practice has been somewhat frequent of late years of organizing companies—particularly mining companies—with stock having a face value of one cent, five cents, or some other amount less than one dollar. Where the law permits this to be done, the object is usually to avoid paying a heavy organization fee, or in some manner to reduce taxation. The value of a share depends on the number of shares, and not on the face value. The promoters expect to obtain an advantage by making the par value of stock less than one dollar. The legislature in such cases has the right to make the tax depend on the number of shares instead of the par value of each share. Classi-

fication based on this reasonable discrimination was sustained in

Postal Telegraph Co. vs. Adams, 155 U. S., 688.

Magoun vs. Ill. T. & S. B. Co., 170 U. S., 283.

DUE PROCESS OF LAW.

Our statute provides that on the first day of May, annually, each corporation shall pay a "state license tax" apportioned to its capital stock.

It then provides that if such corporation fails to pay this tax it shall forfeit its charter, if a domestic corporation, and its right to do business in the state if a foreign corporation, and shall not be permitted to prosecute any suit, etc. But, before this penalty can be enforced, the statute requires that the auditor shall, within sixty days after the first day of May, serve it with notice of its failure, and provides that it may be able to pay this tax within six months and regain the right to do business, and this is "due process of law," and affords to every one the protection required under the fourteenth amendment to the Constitution of the United States, and is within the decision of Justice Miller in the case of

McMillan vs. Anderson, 95 U. S., 37, 40.

This action is in the nature of a *quo warranto*. We are not seeking in this suit to prevent the defendant from having its day in court before its right to do business is forfeited. Section 66 says that

> "The fact of such failure may be pleaded and maintained as an absolute defense to any and all suits or proceedings in law or equity brought or maintained by or on behalf of such corporation in any court of competent jurisdiction within the limits of this state until such tax is paid."

I see no reason why the state may not deny to the creature it produces the processes of the state when it refuses to obey its law and contribute to the support of the government the tax imposed by the state in any constitutional way. The support of the government is a condition precedent to the right of its protection.

It is not necessary to digress into a consideration of this section as to whether the penalty of these sections is self-executing. A *quo warranto* proceeding may be necessary if the state wishes to forfeit the charter, but in the case before us the statute only suspends the business until the tax is paid.

We have chosen to proceed against this corporation by a direct proceeding, and, therefore, the objections made to this part of the law are not material.

It is a well settled principle of law that where separate and distinct paragraphs of a statute can be separated and given force and effect without the adoption of the remainder, the court may sustain the good and declare invalid the bad.

It is enough to sustain this action of *quo warranto* that sections 64 and 65 of the statute fix the obligation of the corporation. The tax can be collected in an action of debt even if the penal statutes fail. Sections 67 and 68 fix the procedure in case of failure of the corporation to comply with this obliga-

tion. If the corporation persists in a determination to do business, regardless of its obedience to the law, then it is an appropriate remedy on the part of the state of Colorado to proceed against it by *quo warranto*. The constitutionality of section 66 can only be raised when suit is brought by the American Smelting and Refining Company and some defendant undertakes to plead that it is not in a position to sue at law or equity, for the reason that it has failed to pay the license tax.

> "Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly regarded as due process of law if it conforms to the customary usage."
>
> Wulzen vs. Board, 40 Am. St. R., 18.
>
> McCullough vs. Maryland, 4 Wheat., 317.
>
> Fallbrook vs. Bradley, 164 U. S., 113.

> "Process of taxation does not require the same kind of notice as is required in a suit at law, or even in proceedings for taxing private property under the power of eminent domain. It involves no violation of due process of law when it is executed according to customary forms and established usages."
>
> Bell's Gap R. R. Co. vs. Penn., 134 U. S., 232, 239.
>
> Palmer vs. McMahon, 133 U. S., 660.

> "Of the different kinds of taxes states may impose there is a vast number of which,

from their nature, no notice can be given the taxpayer; nor would notice be of any advantage to him; such as poll taxes, licenses, taxes (not dependent on extent of business), and generally specific taxes on things, persons or occupations. In such cases the legislature, in authorizing the tax, fixes the amount, and that is the end of the matter. If the tax is not paid, property may be sold and the owner be thus deprived of it. Yet there can be no question that the proceeding is due process of law, as there is no inquiry into the weight of evidence or other element of judicial nature, and nothing could be changed by hearing the taxpayer. No right of his is thereby invaded. Thus, if the tax on animals be fixed at a sum per head, or on articles at so much per yard, bushel or gallon, there is nothing the taxpayer can do to affect the amount to be collected from him. So if a person wishes a license to do business of a particular kind, or at a particular place, such as keeping hotel or restaurant, or selling liquor, cigars or clothes, he has only to pay the amount required by law. There is no need in such case for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in a state, or on domestic corporations for franchise, the parties have only to pay the amount. In such cases there is no need for notice or hearing, as the amount would not be changed. But where a tax is levied on prop-

erty not specifically, but according to value, to be ascertained by assessors, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law to hear complaints respecting the justice of the assessment. The law in prescribing the time when such complaint will be heard gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax is not paid, by a sale of the delinquent's property, is due process of law."

Hager vs. Reclamation District, 111 U. S., 709.

Kentucky Railroad Tax Cases, 115 U. S., 321.

SIMILAR CASES.

A principle similar to the one involved in the Colorado statute runs through the following cases. In each of these cases an annual state corporation license tax was sustained and very many of the questions raised in this case were argued and passed upon. In most of these cases the tax was declared to be a business or occupation tax and was levied upon corporations for the right to do business as a class sepa-

rate and distinct from natural persons. In short, nearly all the questions raised in this case were passed on in these decisions:

Memphis G. L. Co. vs. Shelby Co., 109 U. S., 398.

Lumberville Del. Bridge Co. vs. St. Bd., 25 L. R. A., 137.

Copper Co. vs. Scherr, 50 W. Va., 533.

Capital City W. Co. vs. Bd. Rev., 117 Ala., 303.

Stand. Und. Cable Co. vs. Atty. Gen., 46 N. J. Eq., 270.

State vs. Underground Cable Co., 18 Atl., 581.

Southern Gum Co. vs. Laylin, 66 Oh. St. Rep., 578.

Home Ins. Co. vs. New York, 134 U. S. Rep., 594.

Adams Express Co. vs. Ohio, 166 U. S., 185.

Horn Sil. Min. Co. vs. N. Y., 143 U. S., 305.

State vs. Auburn School, 58 L. R. A., 110.

Phoenix Carpet Co. vs. State, 22 So. Rep., 627.

Atty. Gen. vs. Bay State Min. Co., 99 Mass., 148; 96 Am. Dec., 717.

State vs. Stonewall Ins. Co., 89 Ala., 335.

Lumber Co. vs. Ward, 30 W. Va., 43.

INTERSTATE COMMERCE.

We have printed all the material evidence in the first part of the brief relating to the interstate commerce business of defendant. The question arises whether or not the business of The American Smelting and Refining Company is interstate commerce.

Suppose a flour mill is erected at Greeley, Colorado, and wheat shipped to it from Kansas, Nebraska and Wyoming is ground into flour which is afterwards shipped to Chicago to be marketed—would the business of running a flour mill at Greeley be interstate commerce?

Suppose the Colorado Fuel and Iron Company, with its great plant at Pueblo, receives iron ores from Montana, Utah and Nevada, and manufactures them into steel rails, which it sells under contract to the various railway companies throughout the world—is the business of manufacturing steel rails at Pueblo interstate commerce?

And so, the particular business of The American Smelting and Refining Company is the receiving and treatment of ores and the extraction of the precious metals therefrom, and the product is then shipped to other plants, where it can be refined.

The flour mill may send its agent into any of the neighboring states to contract for the shipment of wheat, and if it does so, no tax can be levied upon the right to enter another state and purchase wheat, nor upon the transportation of the article, nor upon the article while in transit. But this does not prevent the taxation of the flour mill at Greeley as property, nor the taxation of the occupation of grinding wheat

into flour. And so, The American Smelting and Refining Company can not be taxed for sending its agents into other states to purchase ores.

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities. For the regulation of commerce, as thus defined, there can be only one system of rules applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such system. Action upon it by separate states is not, therefore, permissible. Language affirming the exclusiveness of the grant of power over commerce as thus defined may not be inaccurate, when it would be so if applied to legislation upon subjects which are merely auxiliary to commerce."
>
> County of Mobile vs. Kimball, 102 U. S., 691, 702.
>
> 2 Tucker's Cons. U. S., 534, 535-536.
>
> Gibbons vs. Ogden, 9 Wheat., 189, 227, 229.

> "Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said,

intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which said commerce may be conducted. Welton vs. Missouri, 91 U. S., 275; Mobile Co. vs. Kimball, 102 U. S., 691; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196; 5 Sup. Ct., 826; Hooper vs. California, 155 U. S., 648, 653; 15 Sup. Ct., 207; U. S. vs. E. C. Knight Co., 156 U. S., 1; 15 Sup. Ct., 249."

Hopkins vs. U. S., 171 U. S., 578.

Transportation of grain does not become interstate commerce if in the course of shipment from a point in another state into the state of New York it is required to pay storage in an elevator and it is not taken by the first carrier on a through bill of lading. That is, if the storage in the elevator is only incidental to its transportation and the bill of lading is through to destination, then it is interstate commerce; but if the shipment is not marked for this course of procedure, then it is not interstate commerce. I believe this case is decisive of some of the points attempted to be settled by the evidence in the case before the court.

U. S. vs. Lehigh Val. Ry. Co., 26 Am. & Eng. R. R. Cases, 682; 115 Fed. Rep., 373.

Kelley vs. Rhoads, 188 U. S., 1.

Coe vs. Errol, 116 U. S., 517.

Munn vs. Illinois, 94 U. S., 113.

The Daniel Ball, 10 Wall., 565.
Wabash Ry. Co. vs. Ill., 118 U. S., 557, 565.

Plaintiff in error has come into our state, set itself up in business, and is carrying on business within the state as distinguished from corporations which incidentally engage in business in the state. It is not taxed for the privilege of sending its agents into other states to buy ore, nor is it taxed for the privilege of buying ore shipped to it from outside. The transaction of buying ore outside of the state or within the state is not taxed or licensed. If a tax were imposed upon any of the instruments or agencies required in the shipping of the ore to and fro, this would be an interference with interstate commerce. If the bills of lading were taxed, this would be invalid. But the license tax imposed under our statutes is not levied upon any of those transactions. The annual revenue license tax is imposed for the privilege which appellant enjoys of setting itself up in business in the state of Colorado, erecting its plants within its boundaries, smelting ores there, participating in the right of the protection of the laws of the state, both in reference to its property and its business transactions. It has become domiciled in the state, and for this privilege it is required to pay an annual license tax.

A saloon that buys its cordials in Italy, its wines in France, its whiskies in Kentucky, its beer in St. Louis, and its bar fixtures in Chicago, and receives them all in Denver and carries on a mercantile business throughout our western states, might just as well claim that it is engaged in interstate commerce and

refuse to pay a license for the privilege of setting itself up in Denver, and, although the license is often made so great as to be a serious burden upon the business, its imposition has never been held to be a violation of the federal Constitution.

Waters Pierce Oil Co. vs. Texas, 177 U. S., 28.

Judson on Taxation, section 158.

Penn. vs. Knight, 192 U. S., 21.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S., 611.

There are several important decisions illustrative of the right of a state to keep a corporation out of its territory until it complies with the conditions which the state sees fit to impose upon its admission. This right to exclude is recognized by the Supreme Court of the United States in those decisions where it sustains the right of a state to impose a fee as a condition precedent to the right to file its articles of incorporation. The exercise of this right must be understood in contradistinction to the lack of authority to prohibit a corporation from coming into the state, or for the purpose of enforcing its demands for goods already sold and delivered. But where a foreign corporation comes into the state, builds warehouses for the purpose of containing its goods, and from such establishments carries on a mercantile business, then such corporation becomes an establishment of the state, and may be required, lawfully, to pay an annual license tax. It may do all its commercial business outside of the state free and untrammeled. It may buy and sell, import and export, col-

lect, sue and disburse, and the state can not restrict it in the exercise of such incidents of commerce. But when it comes into the state as a resident and seeks to set itself up in business, it must, if the state so desires it, pay an annual license tax for the privilege of carrying on intra-state business.

Chapters 4 and 5, Judson on Taxation, especially sections 147 and 183.

The Wabash Railroad, being a consolidation of companies existing under the laws of Ohio, Michigan, Indiana, Illinois and Missouri, wished to file its articles of consolidation under the laws of the state of Ohio as it had done in other states. Its capitalization was $52,000,000, and the state insisted upon one-tenth of one per cent. of the entire stock as a fee for incorporation under the Ohio law, making the sum of $52,000 as the fee. The company offered to pay $700, being one-tenth of one per cent. on the capital of $700,000, which was the capital of the Ohio corporation.

It was claimed that the $52,000 was on capital employed outside of the state, was extraterritorial in force and a burden on commerce. The Supreme Court held that it was for the state of Ohio to determine what condition it would annex to the privilege of incorporating under its laws; that the purpose of filing its articles was to secure to the consolidated company certain powers, immunities and privileges which appertain to a corporation under the laws of the state of Ohio, and that this incorporation involved no inter-

ference with interstate commerce, or taxation of property *beyond* the limits of the state.

Ashley vs. Ryan, 153 U. S., 436.

> "The foreign corporation therefore must establish a *business domicile* of some sort in the state before it can become subject as a corporation to the taxing laws of the state by reason of 'carrying on business' therein.
>
> "It may have property in the state which is taxable as property, but neither the ownership of such property nor the relation of stockholders, patent licensor, nor creditor to a domestic corporation, constitutes 'carrying on business' in the state, unless it has a business domicile in the state, a sales agency, manufacturing plant, distribution warehouse, or an interest in a domestic partnership. It must in some way establish a place within the state for doing some part of its corporate business."

Judson on Taxation, section 181.

Many decisions have been rendered by this court sustaining a license tax on corporations, railroads, telegraph companies, confined exclusively to that portion of its business carried on within the state. The leading case on this proposition is

Postal Tel. Co. vs. Charleston, 153 U. S., 692.

Judson on Taxation, chapter 7.

In the opinion in this case, the Supreme Court of the state of Colorado ruled that section 65 did not

levy a tax upon the interstate commerce of plaintiff in error. The language of the court in reference to this objection is as follows:

> "The tax is not levied upon any article that is imported into, or exported from, this state, nor is any instrument of interstate or foreign commerce taxed, nor is any burden placed upon that commerce in the sense in which that term is used in the federal Constitution. If there is any burden at all, it is only incidental and such as results from all legitimate taxation."

The actual operation of this statute does not cast any burden upon the interstate commerce business of the smelter. Under this interpretation, if the company refuses to pay the tax, the operation of its smelters within the state of Colorado must cease, and this is not a violation of any principle of the federal Constitution.

The presumption is that the state intended to enact a law within its powers.

Grenada vs. Bragden, 112 U. S., 269.

If a statute is susceptible of two constructions, that one will be adopted which will avoid unconstitutional acts.

Parsons vs. Bradford, 3 Pet., 433.

If the court can give it a reasonable interpretation, so that its application will not interfere with

interstate commerce, then the court should adopt that construction.

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

Osborne vs. Florida, 164 U. S., 650.

Noble vs. Mitchell, 164 U. S., 368, 372.

An annual license tax of $100 for each main line of railroad to and from other points in the state of Alabama was sustained.

City of Anniston vs. S. Ry. Co., 112 Ala., 557.

The Supreme Court of the United States has sustained an annual license tax imposed upon railroads, limited to the domestic business of such corporation.

Penn. vs. Knight, 192 U. S., 21.

The application I wish to make of this decision concerning the power of a state to tax even railroads and telegraph companies is this: Such a statute does not interfere with any business which an agency of interstate commerce conducts outside of the state. It may be a burden upon the corporation engaged in such business; it may even so seriously cripple it as to embarrass it in proceeding in its interstate business, but, as a matter of fact, the commerce which it is an instrument in conducting between the states is not interfered with or obstructed.

The discussions in relation to railroads, express companies and telegraph companies show that the annual corporation license tax must bear in some manner upon commerce between the states in order

to be invalid. It is not enough that the law touches the corporation itself, the fact that it affects the agent of interstate commerce is not sufficient to render it invalid. It must touch commerce between the states in order to be unconstitutional. If we consider these statutes as applied to The American Smelting & Refining Company, on those facts as explained in the testimony, we are unable to perceive how an annual license tax imposed by our statute can be a tax on commerce between the states. If this law is invalid as to the plaintiff in error, I can not see how an annual license tax can be recovered from any corporation. It would be a very simple matter for every one of them to buy goods in other states and ship them into this state, and then sell them to citizens of other states. This would represent one phase of the business claimed to be conducted by the plaintiff in error. It would be equally as easy for these corporations to arrange to purchase in Colorado the goods shipped to it by citizens of other states, and after receiving them to sell and deliver to citizens of other states. This would be analogous to another phase of the business carried on by The American Smelting & Refining Company. It is the commerce itself that must be burdened, directly or indirectly, as, for instance, a tax upon tonnage, bills of lading, and goods themselves while in transit, a drummer, a common carrier, or the agent who promotes the business of the common carrier. The tax on the cars, the road bed, and the buildings of the railroads within the state for the purpose of carrying on business, are subject to taxation, and indirectly such a burden may seriously interfere with the business of interstate commerce; yet the tax is sustained, having too remote a bearing to be any vio-

lation of the federal Constitution. Property has always been held subject to taxation, although employed in carrying the federal mail. In every case which we have examined the distinction which the court makes is, Does the tax bear upon commerce itself, or upon such an agency of commerce? This corporation refuses to pay; can it be closed down for failure to pay the tax? We will say that it can. Does this obstruct interstate commerce? So far we do not find that it is engaged in any commerce any more than the laundry that washes clothes shipped in from another state and reshipped. Laundries have been held not to be engaged in interstate commerce.

Smith vs. Jackson, 54 S. W., 981.

> "Reasonably construed, the Constitution and statute of Colorado forbid, not the doing of a single act of business in the state, but the carrying on of business by a foreign corporation without the filing of the certificate and the appointment of an agent, as required by the statute.
>
> "The meaning of the phrase 'to carry on,' when applied to business, is well settled. In Worcester's Dictionary the definition is, 'To prosecute, to help forward, to continue, as to carry on business.' The definition given to the same phrase in Webster's Dictionary is: 'To continue, as to carry on a design, to manage or prosecute, as to carry on husbandry or trade! The making in Colorado of the one contract sued on in this case, by which one party agreed to build and deliver in Ohio certain machinery, and

the other party to pay for it, did not constitute a carrying on of business in Colorado.

"The obvious construction, therefore, of the Constitution and the statute is that no foreign corporation shall begin any business in the state, with the purpose of pursuing or carrying it on, until it has filed a certificate designating the principal place where the business of the corporation is to be carried on in the state, and naming an authorized agent, residing at such principal place of business, on whom process may be served. To require such a certificate as a prerequisite to the doing of a single act of business, when there was no purpose to do any other business, or have a place of business in the state, would be unreasonable and incongruous."

Cooper Mfg. Co. vs. Ferguson, 113 U. S., 727.

"It is quite competent, no doubt, for Colorado to prohibit a foreign corporation from acquiring a domicile in that state, and to prohibit it from carrying on within that state its business of manufacturing machinery. But it can not prohibit it from selling in Colorado, by contracts made there, its machinery manufactured elsewhere, for that would be to regulate commerce among the states."

Id., pages 727, 737.

The power of the state to regulate commerce confers upon the general government the control of inter-

course between persons of different states; the transportation of articles between points in different states, and does not permit the state to pass any law which would tend to burden such intercourse or traffic. This relates to correspondence between the different states, the transportation and means of transportation, but it does not take away from the states the power to control the operation of manufactures; as, for instance, steel works, car shops, mills, smelters and reduction works, and it is immaterial that in the prosecution of the business of such manufactures it becomes necessary for the corporation to participate in interstate commerce. So far as the transactions involve commerce, the state can not interfere with those powers of the factory. The remark, therefore, of Judge Woods in Cooper Manufacturing Co. vs. Ferguson, supra, is worthy of consideration:

> "The prohibition against doing any business can not, therefore, be literally interpreted."
>
> Cooper Mfg. Co. vs. Ferguson, supra, pages 734, 739.
>
> Postal Tel. Co. vs. Adams, 155 U. S., 700.

A tax on intra-state business is valid.

> Postal Tel. Co. vs. Charleston, 153 U. S., 692.
>
> Pacific Express Co. vs. Seibert, 142 U. S., 339.
>
> Osborne vs. Florida, 164 U. S., 650.

Maine vs. Grand Trunk Ry., 142 U. S., 217.

Diamond Match Co. vs. Ontonagon, 188 U. S., 82.

Diamond Glue Co, vs. U. S. Glue Co., 187 U. S., 611.

CONCLUSION.

The authorities abundantly establish that the proper construction of section 65 is to view it as levying a tax on the business of the corporation. There is no lack of "due process of law" in the imposition of this tax, or the enforcement of the statute in this case. The American Smelting and Refining Company is not a citizen of the United States within the meaning of the fourteenth amendment and is not entitled to the protection of the clause which prohibits any state from passing or enforcing any law which abridges the privileges or immunities of any citizen of the United States. The assignment of error which relates to the alleged violation of the fifth amendment, has no application. The fifth amendment is not a limitation upon the power of the states.

We believe sections 64 and 65 afford a reasonable classification of corporations for the purpose of revenue.

We do not concede that there is any valid objection to section 66. It is the duty of a subject to support the government before it has a right to insist on its aid or protection. But it is urged that individuals are not required to pay this tax as a pre-

requisite to their right to sue, and that there is no reasonable ground for discriminating against corporations, when the latter desire to ask the aid of the courts. However, we submit that the question is not involved in this suit, because this is a direct proceeding in the nature of a *quo warranto*, testing the right of the corporation to continue its business without complying with the revenue laws of the state.

This is the course pursued in this proceeding, and the defendant has been called upon to show cause why it should not cease to do business in the state of Colorado until it has paid the tax. It has answered, setting up that sections 64 and 65 are unconstitutional because they are in violation of the principles of uniformity enjoined by the Constitution of the state of Colorado; that there is unjust discrimination manifest in taxing a domestic corporation at one rate and foreign corporations at a greater rate; that there is unjust discrimination as between different kinds of foreign corporations, depending upon the face value of their stock; that this company is engaged in interstate commerce and is not subject to a state license tax. It also alleges that these sections impair the obligation of the contract existing between it and the state of Colorado. If it has not made good these objections, then the tax is valid and the company should pay it; if the method adopted by the legislature of Colorado to enforce prompt payment is objectionable and invalid, those provisions can only be passed upon when a private defendant seeks to give them force and effect. In this instance, we have chosen to rely upon the power of the sovereign state to inquire into the right of this corporation to do business in violation of a valid section of the revenue act; if it has

failed to give any good and sufficient answer, the judgment of the state court, forfeiting its right to do business in the state until the tax is paid, should be affirmed.

The proceeding outlined in sections 67 and 68 are not in violation of "due process of law," because there is no inherent right in a taxpayer to have his day in court before he can be made to forfeit his property or right to do business for failure to pay. In the case of a tax on property, some appropriate opportunity to be heard is required, or else the law has generally been held unconstitutional. But where the tax is in the nature of a license tax, levied for revenue purposes, the right to conduct the business becomes a privilege and a person has not the constitutional right to carry it on unless he first pays the tax. In case of refusal, the remedy is summarily to stop the business.

The method of collecting a tax is always summary, and a right to be heard in court is not indispensable. Corporations, trades, professions and franchises are as much subject to taxation as property, and when they are taxed as a condition precedent to their enjoyment, failure to pay the tax forfeits the right of enjoyment. The tax is an arbitrary amount; the valuation of the business has nothing to do with its payment; there really is nothing concerning which the corporation can be heard.

If sections 66, 67 and 68 are invalid, still sections 64 and 65 may stand, because they create the obligation to pay a tax that can be enforced in the nature of an action in debt.

Sections 67 and 68 are not objectionable. They relate to the notice required to be given and extend to the corporation an opportunity to remove the pen-

alty it has incurred by failure to pay the tax. The real objection goes to sections 65 and 66. The enforcement of the latter section, we submit, is not involved in this action.

Section 65 makes the payment of this tax a condition precedent to the right to do business; therefore, an action in the nature of a *quo warranto* in the name of the people of the state of Colorado is an appropriate remedy—to enforce the section and take away the right of the company to do business until it is willing to submit to this particular revenue statute.

Lumber Co. vs. Ward, 30 W. Va., 43.

It is, therefore, respectfully submitted that the judgment of the Supreme Court of the state of Colorado should be affirmed.

Respectfully submitted,

N. C. MILLER,
Attorney General of the State of Colorado
and Attorney for Defendant in Error.

APPENDIX A.

STATE LICENSE ON CORPORATIONS

"Sec. 64. In addition to all other fees and taxes now provided for by law, every corporation which has heretofore obtained, or which shall hereafter obtain, a charter or certificate of incorporation from this state, and having a capital stock of $25,000.00 or over, shall pay, on or before the 1st day of May of each year, or at the time of obtaining such charter or certificate of incorporation, and on or before the 1st day of May of each year thereafter, as the case may be, an annual state corporation license tax to the auditor of the state of Colorado, as follows:

"Two cents upon each one thousand dollars of its capital stock.

"Sec. 65. Every foreign corporation which has heretofore obtained, or which shall hereafter obtain, the right and privilege to transact and carry on business within the limits of the state of Colorado, shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this state, pay annually, on or before the 1st day of May of each year, or at the time of obtaining such right or privilege, and on or before the 1st day of May of each year thereafter, as the case may be, to the auditor of the state of Colorado, a state license tax as follows:

"Four cents upon each one thousand dollars of its capital stock; Provided, That in cases of foreign corporations, the par value of whose shares of stock is less than one dollar per share, they shall pay as

such tax at the rate of two and one-half cents per thousand shares.

"Sec. 66. Every corporation which shall have failed to pay the tax provided for in sections 64 and 65, shall, by reason of such failure, forfeit its right to do business within the limits of this state until such tax is paid, and shall be absolutely and wholly deprived of all such rights and privileges, and the fact of such failure may be pleaded and maintained as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporation, in any court of competent jurisdiction within the limits of this state, until such tax is paid.

"Sec. 67. It shall be the duty of the state auditor, immediately on the passage of this act and on or before the 1st day of February annually hereafter in each year, to notify every corporation liable to tax hereunder, of the time of payment of such tax, and such notice shall contain a copy of this section and of sections 64, 65 and 66.

"Sec. 68. It shall be the duty of the state auditor, within thirty days after the 1st day of every May, to notify in writing, all such corporations as have forfeited their charters or their rights to do business within the state of Colorado, under the provisions of the foregoing sections, and any such corporation which shall, at any time after such notice pay to the auditor the tax payable on or before the 1st day of May of that year and ten per cent. of said tax in addition thereto, for every six months or fractional part of six months, from the date of said notice, shall thereupon be relieved from the forfeiture of its charter or

right to do business within the said state, by reason of such failure.

"Nothing in sections 64, 65, 66 and 67 shall be construed as imposing a license tax upon corporations chartered strictly for educational, social, literary, scientific, religious or charitable purposes, or ditch or irrigation corporations whose property is exempt by law from taxation, or upon charters incorporating Masonic lodges, Odd Fellows' lodges, or other fraternal or benevolent societies. But insurance companies not capitalized shall pay a yearly tax of one dollar per thousand on the gross premiums collected in this state, in addition to the other taxes and fees provided by law; Provided, That nothing in sections 64, 65, 66 and 67 contained shall be construed as applicable to organizations which conduct their business as fraternal societies on the lodge system, or which limit their certificate holders to a particular secret order or fraternity.

"The auditor of the state shall, within thirty days after the receipt of any moneys collected by him under the foregoing sections, whether paid under protest or not, pay the same into the general treasury of the state, and shall take, at the time of such payment, a receipt or receipts from the state treasurer, showing upon its face the exact amount of such moneys paid to said treasurer, and on what account and from what source the same was derived. The fees provided for in sections 64 and 65 are in addition to the other fees and taxes provided for by law.

"Sec. 69. For the purpose of the foregoing tax the fiscal year for basing such tax shall begin with May 1 of each year, and end with April 30 of the suc-

ceeding year, and that the foregoing prescribed tax shall apply to each fiscal year, or fractional part thereof."

Page 73, Revenue Act of Colorado, adopted in 1902.

APPENDIX B.

VALUATION OF INTANGIBLE PROPERTY.

Section 61. In arriving at the value of the property owned by any corporation, foreign or domestic, not only its tangible property, whether it be within the state, or partly within and partly without this state, shall be looked to by the assessor and state board of equalization, but its intangible property, such as special privileges, rights of way, franchises, contract rights and obligations shall be considered, that is to say: The entire business, plant or enterprise, of such corporation shall be valued as a unit, and every element, subject or consideration wherein the use is in inseparable combination with a whole, of which it forms a part, and which gives to the corporation property an added value for the purposes of income or sale, shall be considered in fixing the value for taxable purposes. Nothing herein contained shall be deemed to interfere with the provision of this act relating to the assessment and taxation of the properties of corporations doing business in two or more counties.

Section 62. For the purpose of arriving at the total value of any business plant or enterprise, and of the intangible property to be assessed, the assessor shall require the party making such return, or any other persons, to give information under oath as to the total value of said business, and any other information that such assessor may deem necessary to enable him to arrive at the value of the plant as a whole. In case of failure or refusal of the party making such return to give to the assessor such information as may be required, such assessor may, upon petition to the County

or District Court or the judge thereof, setting forth the refusal of said party or his failure, as the case may be, to answer questions propounded, cause said party to be cited to appear before said court or judge, and there be examined at length as to all matters required in arriving at a proper value of said plant or business, and said court or judge shall have full power to punish, as a contempt, any failure in such case to give the required information.

Section 63. Every corporation, doing business and owning property in two or more counties of the shall, except as otherwise provided in this act, in ion to the other property required by this act to listed, make out and deliver annually to the auditor of state its schedule and sworn statement setting forth particularly,

First—The name and location of the principal office of the company or association.

Second—The amount of the capital stock thereof, as authorized by the charter or articles of association, and the number of shares into which such capital stock is divided.

Third—The amount of capital stock paid in, and the amount of its bonds outstanding, if any.

Fourth—The average market value of such stock and bonds during the twelve months next preceding the date of such report, or, if the same be without market value, then the actual value thereof.

Fifth—The total indebtedness of such corporation, except indebtedness for current expenses, excluding from said expenses the amount paid for the purchase or improvement of property.

Sixth—The value and location of all its property.

Seventh—The gross earnings of such corporation during the twelve months ending with the thirty-first day of March next preceding.

Eighth—The net earnings of said corporation during the same period.

Ninth—The difference in value between all tangible property and the capital stock, and the mortgage or bonded indebtedness.

Tenth—The name and particular description of each franchise of privilege owned or enjoyed by such corporation, and the value thereof.

Such schedule shall be made in conformity to such instructions and forms as may be prescribed by the auditor of state, and the auditor shall prescribe and deliver to each county assessor such forms, together with the blank forms for such returns of corporation stock and properties, as hereinbefore prescribed. Every such return shall be sworn to by the president or other proper accounting officer of the corporation, and the state auditor shall on or before the fifteenth day of July in each year transmit a copy of such returns to the assessor of each of the several counties interested in such assessment.

In case any corporation shall wilfully fail or refuse to make such report and return, such corporation shall forfeit and pay the sum of one hundred dollars, and one hundred dollars in addition thereto for each day during which such report is delayed beyond the first day of June, to be sued for and recovered in any proper form of action, in the name of the people of the state of Colorado on the relation of the board of county commissioners of the proper county. Such penalty, when collected, shall be paid into the county treasury, and it shall be the duty of the board of

county commissioners of the county to enforce the provisions of this section.

In respect to every corporation having property and doing business in two or more counties of this state, only other than those assessable by the state board of equalization, the county assessor shall assess that part of the intangible property of any such corporation in the proportion that its tangible property in the county bears to its tangible property wherever situate.

Every corporation other than those assessable by the state board of equalization, having property and doing business in two or more counties in this state, and also having property and doing business outside of this state, shall also comply with the provisions of this section; and in respect to all such corporations the assessor shall assess that part of the intangible values of any such corporation in the same proportion that the tangible property in his county bears to tangible property of the corporation wherever situate.

The tax upon the intangible property of every such corporation shall be a lien upon the tangible property of such corporation wheresoever situate, and if any such tax is not paid when the same ought to be paid, the treasurer of the county where occurs the failure to pay such tax shall collect the said tax in the same manner and with like effect as if the same were delinquent taxes against tangible property.

Session Laws of 1902, page 70.

APPENDIX C.

"No corporation, joint stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom or of any state or territory of the United States, beyond the limits of this state, shall exercise any corporate powers or acquire or hold any real or personal property, or any franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this state until it shall have received from the secretary of this state a certificate setting forth that full payment has been made by such corporation, joint stock stock company or association, of all fees and taxes prescribed by law to be paid to the secretary of state, and every such corporation, joint stock company or association shall pay to the secretary of state for each such certificate, a fee of five dollars. Nothing in this section shall apply to corporations not for pecuniary profit, or corporations organized for religious, educational or benevolent purposes."

3 Mills' Annotated Statutes (Rev. Supp.), section 491i.

AUTHORITIES CITED.

Page

Adams Ex. Co. vs. Ky. 17
Adams Ex. Co. vs. Ohio. 21, 30, 54, 57, 74
Adams Ex. Co. vs. Ind. 54
Am. Sug. Ref. Co. vs. Louisiana. 66
A. S. & R. Co. vs. People. 35
Ames vs. People. 25
Ashley vs. Ryan. 81
Atty. Gen. vs. Bay State M. Co. 74
Augusta vs. Earle. 61

Bank vs. Billings. 47
Barbier vs. Connolly. 51
Bell's Gap R. R. Co. vs. Penn. 30, 71
Billings vs. Ill. 66, 68
Bd. Co. Comrs. vs. Wilson. 12
Brannon on Fourteenth Amendment. 53
Brown vs. Elder. 11, 35
Burgess vs. Seligman. 35

Capital Cy. W. Co. vs. Bd. Rev. 74
Cal. vs. Pac. R. R. Co. 28
City of Anniston vs. So. Ry. Co. 83
Coe vs. Errol. 77
Com. vs. Peoples Five Cent S. B. Co. 23
Connolly vs. Union Sewer Pipe Co. 67
Cooper Mfg. Co. vs. Ferguson. 19, 83, 86, 87
Copper Co. vs. Scherr. 61, 74
Co. Mobile vs. Kimball. 76
Cotting vs. K. C. S. Y. Co. 67

Daniel Ball, The..... 78
Delaware R. R. Tax Cases.....27, 47
Denver Cy. Ry. Co. vs. Denver..... 35
Diamond Match Co. vs. Ontonagon..... 88
Diamond Glue Co. vs. U. S. Glue Co.....79, 88
Ducat vs. Chicago..... 61

Elmendorf vs. Taylor..... 33

Fallbrook Irr. Dist. vs. Bradley.....35, 71

Gibbons vs. Ogden 76
Giozza vs. Tiernan..... 26
Green vs. Neal's Lessee..... 34
Grenada vs. Bragden..... 82
Griffin vs. Ins. Co..... 46

Hagar vs. Reclamation Dist..... 73
Henderson Bridge Co. vs. Ky..... 17
Home Ins. Co. vs. N. Y.....21, 26, 27, 28, 56, 57, 74
Honduras Co. vs. State Bd..... 24
Hopkins vs. U. S..... 77
Horn Silver Min. Co. vs. N. Y.....24, 27, 57, 74

Joplin vs. Light Co..... 50
Judson on Taxation.....79, 80, 81

Kelley vs. Rhodes..... 77
Kentucky R. R. Tax Cas.....55, 66, 73
Kirkland vs. Hotchkiss..... 28
Kittanning Coal Co. vs. Com..... 23

Lumber Co. vs. Ward.....74, 91
Lumberville Del. Bridge Co. vs. St. Bd.....22, 74

Magoun vs. Ill. T. & S. B. Co.....53, 66, 68, 69
Maine vs. Grand Trunk..... 88

Memphis Gas Co. vs. Shelby Co. 47, 74
Merchants' Bank vs. Penn 30
Metropolitan St. Ry. Co. vs. N. Y. 29, 47
Mo. R. R. Co. vs. Mackey 66
Munn vs. Ill. 77
McCullough vs. Maryland 71
McHenry vs. Alford 25, 26, 57
McMillan vs. Anderson 69

Noble vs. Mitchell 83
No. Mo. R. R. Co. vs. Maguire 47

Ohio Trust Co. vs. Debolt 47
Osborne vs. Florida 34, 83, 87

Pac. Ex. Co. vs. Seibert 87
Palmer vs. McMahon 71
Parsons vs. People 11, 35
Parsons vs. Bradford 82
Paul vs. Virginia 59
Pembina Min. Co. vs. Penn 28, 59, 60
People vs. Roberts 23
Penn. vs. Knight 79, 83
People vs. Henderson 20, 25, 55, 58
People vs. Wemple 23
Phoenix Carpet Co. vs. State 74
Postal Tel. Co. vs. Charleston 81, 87
Postal Tel. Co. vs. Adams 25, 57, 58, 69, 87
Prov. Inst. vs. Mass 23

Smith vs. Jackson 85
Southern Gum Co. vs. Laylin 53, 74
Stand. Und. C. Co. vs. Atty. Genl. 24, 74
State Tax on Foreign-Held Bonds 28
State vs. Auburn School 74

State vs. Heppenheimer 23
State vs. Phil. W. B. R. Co. 23
State vs. State Bd. 24
State vs. Stonewall Ins. Co. 22, 74
State vs. Und. C. Co. 61, 74
Street Ry. Tax Cas. 58
Stutsman Co. vs. Wallace 34

Tomlinson vs. Branch 46
Tucker Const. U. S., vol. 2 76

U. S. Lehigh V. R. Co. 77
U. S. Power Co. vs. State 23

Wabash R. R. Co. vs. Ill. 78
Walla Walla vs. W. W. W. Co. 50
Waters-Pierce Oil Co. vs. Tex 79
Wells vs. Savanah 47
Weston vs. Charleston 28
Wulzen vs. Bd. 71

Yick Wo. vs. Hopkins 32

FILE COPY

FILED.
DEC 19 1906
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

October Term, A. D. 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

N. C. MILLER,
Attorney General, for Defendant in Error.

Smith-Brooks Press, Denver.

In the Supreme Court of the United States.

October Term, A. D. 1906.

No. 143.

AMERICAN SMELTING AND REFINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF COLORADO, ON THE RELATION OF HENRY A. LINDSLEY, DISTRICT ATTORNEY FOR THE SECOND JUDICIAL DISTRICT OF THE STATE OF COLORADO,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

LAW AS TO CLASSIFICATION.

Plaintiff in error contends that it is a person within the meaning of the Fourteenth Amendment to

the Constitution of the United States, and is entitled to the equal protection of the law.

It claims that it was admitted to do business in the state of Colorado and has complied with all the laws requisite for its admission into the state; that a compliance was made with all the laws relating to the admission of foreign corporations previous to the enactment of the revenue statutes involved in this case. It was therefore rightfully in the state of Colorado previous to the imposition of the present form of taxation. It therefore denies the application of all those decisions sustaining a special tax or a charge as a condition precedent to the admission of a foreign corporation into the state to do business.

Our contention is that it is admitted into the state for a period of twenty years, subject, however, to the powers of the state to tax. Among these powers is the right of the state to tax the privilege of carrying on business.

On the other hand, the plaintiff in error represents that it is protected against unlawful discriminations, and that to tax a corporation for the privilege of carrying on business, while natural persons are exempt, is a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

It is conceded that a corporation is a person within the meaning of the Fourteenth Amendment to the Constitution of the United States. We also admit that the right to tax a corporation for the privilege of carrying on business, while individuals are exempt from a similar imposition, can only be sustained by pointing out some reasonable ground for distinction.

—some principle that will place the business conducted by a corporation in a class by itself, when considered with reference to the business carried on by a natural person.

The distinguishing principle adopted in making the classification must have some natural bearing upon the subject sought to be attained.

Billings vs. Illinois, 188 U. S., 97.

> "That the franchises, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, admits of no dispute at this day."
>
> State Railroad Tax Cases, 92 U. S., 575, 603.

The reason corporations are considered persons under the Fourteenth Amendment to the federal Constitution is best expressed by Justice Field in *County of Santa Clara vs. Southern Pacific Railroad Co.*, 18 Fed. Rep., 387, 403.

> "Whatever affects the property of the corporation—that is, of all the members united by the common name—necessarily affects their interests. If all the members of the corporation die or withdraw from the association, the corporation is dead; it lives and can live only through its members. When they disappear the corporation disappears. Whatever confiscates or imposes burdens on its property, confiscates or imposes

burdens on their property, otherwise nobody would be injured by the proceeding. Whatever advances the prosperity or wealth of the corporation, advances proportionately the prosperity and business of the corporators, otherwise no one would be benefited. It is impossible to conceive of a corporation suffering an injury or reaping a benefit except through its members. The legal entity, the metaphysical being, that is called a corporation, can not feel either. So, therefore, whenever a provision of the Constitution or of a law guarantees to persons protection in their property, or affords them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; not to the name under which different persons are united, but to the individuals composing the union. The courts will always look through the name to see and protect those whom the name represents. Thus, inasmuch as the Constitution extended the judicial power of the United States to controversies between citizens of a state and aliens and between citizens of different states, because its framers apprehended that state tribunals in such controversies might be swayed by local feelings, prejudices, or attachments, Chief Justice Marshall, speaking for the whole Supreme Court, held that corporations were within the provision. 'Aliens, or citizens of different state,' said that great judge, 'are

not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, can not be an alien or a citizen, but the persons whom it represents may be the one or the other, and the controversy is in fact and in law between these persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals. Such has been the universal understanding on the subject.' *Bank of U. S. vs. Deveaux*, 5 Cranch, 61, 87."

The limitations upon the power of the state to classify is well expressed by this court in American Sugar Refining Company vs. Louisiana, 179 U. S., 89, 92. The question before the court in that case was the power of the state to exempt the producer of the raw material, even though he manufactured sugar therefrom, while it imposed a tax upon the manufacturer who purchased the raw material. Justice Brown said:

> "Of course, if such discriminations were purely arbitrary, oppressive, or capricious,

> and made to depend upon differences of color, race, nativity, religious opinions, political affiliations or other considerations having no possible connection with the duties of citizens as taxpayers, such exemption would be pure favoritism, and a denial of the equal protection of the laws to the less favored classes. But, from time out of mind, it has been the policy of this government, not only to classify for the purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their products upon the market."

The exemption in this instance was based upon public policy. The state claimed the right to encourage agricultural pursuits and tillers of the soil and encourage them in handling their product from the time the seed was planted and the harvest gathered until the final product of sugar was produced. Such a discrimination had in view the best interests of the people and was calculated to promote the welfare of society and the government.

> "Classification is not necessarily based upon any essential difference in the nature or condition of the various subjects. It may be based as well upon the want of adaptability to the same methods of taxation, or upon the impracticability of applying to the various subjects the same methods, so as to produce just and uniform results; or it may

be based upon just and well grounded considerations of public policy."

Judson on Taxation, section 454.

Commonwealth of Penn. vs. Del. Div. Canal Co., 2 L. R. A., 798, 803.

Narrowing this question down to the precise point urged by plaintiff in error, I understand the contention to be as follows: Can a corporation be taxed for carrying on any business, as, for instance, smelter business, iron business, mining business or grocery business, while the individual is exempt from the same tax?

The right to tax corporations for the privilege of carrying on business, while natural persons are exempt, can be justified on the ground of public policy. We have already seen that this is a just basis for classification.

Years ago corporate business was the exception; to-day it is the rule. It is even safe to say that the legislation of the several states concerning corporations was not framed with the view of dealing with the conditions created by the vast and increasing number of corporations. Indeed, the people may view with solicitude the drifting of all manner and forms of business into the control and ownership of corporations. Their control and management is probably one of the greatest questions of the present age, and I merely refer to these matters, not with any animosity toward corporations, but in order to point out the disadvantage that natural citizens suffer in attempting to carry on business in competition with corporations. I think it can be said, with equal truth, that

it is a reasonable discrimination to tax the business of corporations and exempt the business of natural persons.

A corporation has been defined to be: "A collection of several individuals united into one body, under a special denomination, and having perpetual succession under an artificial form and vested by the policy of the law with the capacity of acting in several respects as an individual."

Black's Law Dictionary, page 279.

The plan of organizing corporations enables one person to combine the capital of a large number of individuals for the purpose of carrying on any particular business. The persons whose money is invested may live in numerous states or even in far distant lands, but the power to do business is invested in a corporation which acts in most matters under the direction of a manager. These persons invest their capital in the stock of the concern for profit, and if the enterprise is a success, they are enabled to derive returns from their investment without in the least interfering with their personal attention to some other business. For instance, it may be safe to say that the money that is invested in the stock of the great steel company came from persons who are giving their attention to business entirely remote. I presume everyone has in mind some commercial enterprise which is carried on by a corporation whose stock is owned by persons engaged in other business. Indeed, it is safe to say that nearly all large enterprises of the country are capitalized and conducted in this manner. The result of the power of corpora-

tions to aggregate capital is to drive out of business natural persons. This is a matter of common knowledge. If, therefore, it is correct to say that the subjects of taxation may be classified upon considerations of public policy, I believe the plan of taxing corporations for the privilege of carrying on business is based on the wisest conclusions.

There is a radical difference between the advantages, opportunities and powers of corporations and individuals. Indeed, the race is so uneven between the natural person and the corporations that the former is being almost driven from the important enterprises of the day. All the great schemes that are undertaken and carried out are under the control and ownership of corporate organizations. If the enterprise fails, the individuals escape any further liability than the investment of capital; at least this is so in Colorado. The duty which the corporation owes to the public is entirely different from that which the individual owes. For instance, the individual is subject to military duty, jury duty and service in a posse comitatus, and other duties belonging to a citizen. If he violates any criminal statute in the transaction of business, he is subject to fine and imprisonment, and possibly both; while, in the case of the corporation, it escapes with a fine.

If the discrimination made in the statute passed in the case of the American Sugar Refining Company vs. Louisiana is based upon a reasonagle distinction in principle, we think it follows wth equal force that the power to tax corporations for the privilege of doing business is not an unjust discrimination, because natural persons are exempt. There is no invidious distinction, for all corporations are taxed.

It is true this court has held in *Connolly vs. Union Sewer Pipe Company,* 184 U. S., 540, at 562. that a state has not the power to pass a statute making a certain transaction criminal in the case of a corporation, and allowing natural persons to do the same thing with impunity. But there is the soundest reasoning for the prohibition in this particular, because an act which is criminal if done by a corporation, is equally so if done by an individual.

It is not necessary to advert to those decisions which sustain a different method of assessing the property of corporations from that of individuals. These statutes are sustained because of the essential difference in the nature of the property, and the impossibility of arriving at its value in the same manner as is used in assessing the personal and real property of individuals. Cases of this nature are:

Adams Express Co. vs. Ohio, 166 U. S., 194.

American Express Company vs. Indiana, 165 U. S., 255.

Pacific Express Company vs. Seibert, 142 U. S., 339, 350.

But in the case of McHenry vs. Alford, 168 U. S., 651, the court held that it was not an unjust discrimination to tax the Northern Pacific Railroad as a unit, including its railroad right of way and equipment, and also a large land grant that was not used in the operation of the road.

> " * * * a state statute defining an express company to be such as carried on the

business of transportation on contracts for hire with railroad or steamboat companies, did not invidiously discriminate against the express companies defined by it, by exempting other companies carrying express matter in vehicles of their own. This case is specially pertinent to the one under consideration."

American Sugar Refining Co. vs. Louisiana, 179 U. S., 89, 95.

In New York

"a license fee upon the entire class of persons acting within the state as agents for associations of individual fire underwriters not incorporated under the laws of the state, while the agents of domestic fire insurance corporations were not subject thereto, was held not to involve the unequal application of a tax."

Fire Department vs. Stanton, 159 N. Y., 225.

The right to tax collateral inheritances, as distinguished from those that are direct, the former being subject to taxation, the latter not, has been sustained.

Foreign insurance companies have been distinguished from domestic companies and taxed independently and differently.

Germania Life Ins. Co. vs. Com., 85 Pa., 515.

Commonwealth of Pa. vs. Del. Div. Canal Co., 2 L. R. A., 798, 803.

"It will be perceived that by the Constitution of California, in assessing the property of natural persons for taxation, deduction was to be made for the amount of mortgages thereon; but in the case of railroads no such deduction should be made. It may be proper to state that both these cases were taken to the Supreme Court; but the constitutional questions were not decided in either by that court. The San Mateo case was settled before a decision was rendered; and in the Santa Clara case the court declined to decide the constitutional question, placing its judgment of affirmance on other grounds."

Singer Mfg. Co. vs. Wright, 33 F., 121, 125.

"It appears that under the statute the bonds of a corporation secured by mortgage are subject to taxation in the hands of the holders, while the debt of an individual secured by mortgage is exempt."

Simpson vs. Hopkins, 82 Md., 478, 488.

"We can not, then, assent to the proposition that the taxation of the bonds of a corporation secured by mortgage, while the debt of an individual so secured is exempt, is an arbitrary discrimination against corporations, or the holders of corporate securities.

"An individual's true worth for the purpose of taxation consists of his real and per-

sonal property, but in the case of a corporation its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of a corporation is its bonded indebtedness, together with its stock. In support of this Justice Miller, in State Tax cases, 92 U. S., 605, said:

"It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock and its franchises; for these are all represented by the value of its bonded debt, and of the shares of its capital stock."

"It is quite apparent, then, that this exemption of the mortgage debt of an individual, and taxation of the mortgage bonds of a corporation in the hands of the respective creditors, is not an arbitrary and unreasonable discrimination between the same classes of property. And unless the discrimination be arbitrary, then the wisdom of the exemption is within the discretion of the legislature, and is not subject to control by the courts."

Idem, pages 489-490.

"So far as the alleged exemption of the bonds of foreign corporations secured by

mortgages upon property wholly within the state is concerned, it is only necessary to say that should it be conceded that this class of bonds are exempt, there can be no question that the state can relinquish its right to tax the bonds of foreign corporations without affecting its power to tax the bonds of its own corporations owned by its citizens. Nor can the alleged exemption of the bonds of a corporation, which do not bear interest, be regarded as arbitrary discrimination. The difference between a security that produces interest, and one that does not, and the reasons for the taxation of the one and the exemption of the other, are both clear and obvious. The true test of a taxable value is the producing value to the owner.

"The second contention of the appellant is that the alleged discrimination in the taxation of the bonds is unconstitutional under the fourteenth amendment of the Constitution of the United States. Now, it has been shown that the discrimination in this case is not arbitrary or hostile, but is based upon sound reasons of public policy. In the case of Bell's Gap Railroad Co. vs. Pa., 134 U. S., 237, the Supreme Court said that the provision in the fourteenth amendment that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways; that it was not intend-

ed to compel the state to adopt an iron rule of equal taxation. 'If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the states, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material, but it would render nugatory those discriminations which the best interests of society require.' And to the same effect are the cases of *Pacific Ex. Co. vs. Seibert*, 142 U. S., 339, and *Jennings vs. Coal R. Imp. Co.*, 147 U. S., 147. It follows, then, as section 88, of article 81, of the Code is not in conflict with the provisions of the fourteenth amendment of the Constitution of the U. S., that this contention of the appellants can not be maintained."

Simpson vs. Hopkins, 82 Md., 478, 490-491.

It has been repeatedly held that the right to classify property for taxation belongs exclusively to the state legislature, and its exercise will not be disturbed unless it is used for the purpose of oppression. If there is any just and reasonable basis for discrimination, it is not unjust to classify the subjects of taxation accordingly.

At first glance it may appear very unjust to exempt the mortgages and debts of private persons from taxation, and at the same time to require the taxing officers to tax the mortgages of railroads. But this discrimination has been sustained upon the soundest principles of reasoning.

Justice Brewer, in *Adams Express Company vs. Ohio*, 166 U. S., 194, 220, said:

> "Suppose an express company is incorporated to transact business within the limits of a state, and does business only within such limits, and, for the purpose of transacting that business, purchases and holds a few thousand dollars' worth of horses and wagons, and yet it so meets the wants of the people dwelling in that state, so uses the tangible property which it possesses, so transacts business therein, that its stock becomes, in the markets of the state, of the actual cash value of hundreds of thousands of dollars. To the owners thereof, for the purpose of income and sale, the corporate property is worth hundreds of thousands of dollars. Does substance of right require that it shall pay taxes only upon the thousands of dollars of tangible property which it possesses? Accumulated wealth will laugh at the credulity of taxing laws which reach only the one and ignore the other, while they who own tangible property not organized into a single producing plant will feel the injustice of a system which so misplaces the burden of taxation."
>
> Adams Express Co. vs. Ohio, 166 U. S., 185, 220.

In Paul vs. Virginia, 8 Wall., 168, 181, the court said:

> "At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursuit requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one state, their corporate powers and franchises should be exercised in other states without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those states would soon pass into their hands. The principal business of every state would, in fact, be controlled by corporations created by other states."

In the case of every business carried on by a corporation, there is a decided advantage enjoyed over that possessed by the individual engaged in the same enterprise. This unmistakable difference is what gives rise to the multiplication of corporations that are seizing the entire business of the world today. Sound statesmanship demands on pure consideration of public policy that the business of the corporation be taxed, while the individual is exempt from a similar tax. The individual in business deserves encouragement just as reasonable as does the person who engages in tilling the soil.

I may conclude this subject by the following quotation from *Southern Gum Co. vs. Laylin*, 66 Ohio St. Rep., 578, 595:

"An excise tax may also be imposed on corporations to compensate the state for the additional burden sustained by the state and the people, by reason of property being held in artificial bodies, the persons comprising such bodies being exempt from liability to a great extent for the debts thereof. This ground of excise taxation was recognized in *Adler vs. Shitcbeck*, 44 Ohio St., 539, and was there applied to the liquor traffic because that business was there shown to impose additional burdens upon the state. So the aggregation of capital by corporations imposes additional burdens, and requires regulations not applicable to individuals."

Respectfully submitted,

N. C. MILLER,
Attorney General of the State of Colorado and Attorney for Defendant in Error.

Supreme Court of the United States.

No. 143.—October Term, 1906.

The American Smelting and Refining Company, Plaintiff in Error, vs. The People of the State of Colorado ex rel. Henry A. Lindsley, District Attorney of the Second Judicial District of the State of Colorado, Defendant in Error.	In error to the Supreme Court of the State of Colorado.

[January 7, 1907.]

The writ of error in this case brings up for review the judgment of the Supreme Court of Colorado, which affirmed the judgment of the trial court forfeiting the right of the plaintiff in error, hereinafter called the corporation, to do business as a foreign corporation within the State until a certain tax therein adjudged to be due should be paid. The corporation refused to pay the tax, and thereupon, at the instance of the District Attorney and the Attorney General of the State, a proceeding in the nature of *quo warranto* against the corporation was commenced for the purpose of obtaining a forfeiture of the franchise of the corporation for its failure to pay the "Annual State Corporation License Tax." The defense set up that the tax was a violation of the Federal Constitution as impairing the obligation of a contract, and in other particulars named. Upon the trial the court found that there was due to the State of Colorado the sum of $4,000, being the amount of the annual tax due by reason of the statute, which was held valid. A decree was thereupon entered, forfeiting the right of the corporation to do business within the limits of the State of Colorado until the tax was paid, and it was "absolutely and wholly deprived of all rights and privileges within the State of Colorado, until such tax is paid." Upon appeal to the Supreme Court of the State this judgment was affirmed, and the corporation then sued out this writ of error.

The corporation was incorporated April 4, 1899, in New Jersey, and it is permitted by its articles of incorporation to do business in other States, and to carry on a general ore reduction, milling, mining and other business mentioned in such articles. On April 28, 1899, it duly made application to the proper State authorities of Colorado for permission to enter and transact business in that State, under the laws thereof. At this time its capital stock was $65,000,000, divided into shares of the par value of

$100 each. Subsequently, and on April 8, 1901, its capital stock was increased to $100,000,000, and the certificate of such increase was duly filed in Colorado. Section 499, (Mills Annotated Statutes of Colorado,) after making provision for the performance of certain conditions by a foreign corporation entering the State, continued, "and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater power." Section 500 of the same statute provided that a foreign corporation must file in the office of the Secretary of State a copy of its charter, or, if incorporated under a general corporation law, a copy of such certificate of incorporation, and such general corporation law duly certified. Section 1 of chapter 51 of the Session Laws of Colorado for 1897 provided that every foreign corporation should pay to the Secretary of State, for the use of the State, a fee of $10 if the capital stock did not exceed $50,000. If in excess of that sum the corporation was to pay "the further sum of fifteen cents on each and every thousand dollars of such excess, and a like fee of fifteen cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of certificate of incorporation, articles of association, or charter of said incorporation, joint stock company or association, in the office of the Secretary of State; and no such corporation, joint stock company or association shall have or exercise any corporate powers or be permitted to do any business in this State until the said fee shall have been paid; and the Secretary of State shall not file any certificate of incorporation, articles of association, charter or certificate of the increase of capital stock, or certify or give any certificate to any such corporation, joint stock company or association, until said fee shall have been paid to him." By section 10 of chapter 52 of the Session Laws of Colorado for 1901 it was provided that no foreign corporation could "exercise any corporate power or acquire or hold any real or personal property, franchises, rights or privileges, or do any business or prosecute or defend in any suit, in this State, until it shall have received from the Secretary of this State a certificate setting forth that full payment has been made by such corporation, joint stock company or association of all fees and taxes prescribed by law to be paid to the Secretary of State, and every such corporation, joint stock company or association shall pay to the Secretary of State for each such certificate a fee of five dollars."

In accordance with the provisions of section 1 of the Laws of 1897, above mentioned, the corporation paid, upon filing its certificate, April 28, 1899, to the Secretary of State, for the use of the State, $9,792.50 on its original capitalization; and on May 17, 1901, the further sum of

$5,250 upon its increase of capital stock to $100,000,000. Thereupon the Secretary of State issued a certificate, stating the filing of the proper papers with him, and further stating that "pursuant to the provisions of section 10 of said act, (1901,) I hereby certify that the said company has made full payment of all fees prescribed by law to be paid to the Secretary of State and due at the time of the issuing of this certificate, and is hereby authorized to exercise any corporate powers provided for by law." This was given under the hand and official seal of the Secretary of State, and was dated on the 21st day of May, 1901. There were at this time no other statutes providing for the payment of any charges, fees or taxes for coming into and doing business in the State of Colorado.

The corporation, upon entering the State in 1899 under its permission to enter and transact business therein, immediately commenced to erect a plant for the purpose of carrying on its business as a corporation, and before the commencement of these proceedings it had invested for that purpose in the State sums amounting to more than $5,000,000. At the time the corporation was permitted to enter and carry on its business in the State the statute of Colorado provided that the term of life of corporations formed under the laws of that State should be twenty years. After the corporation had been doing business for some three years, and on March 22, 1902, the legislature of Colorado passed an act in relation to taxes. (Session Laws of Colorado for 1902, pages 43, 160, etc.)

Section 64 of that act provided that all domestic corporations should thereafter and on or before the 1st day of May of each year, or at the time of obtaining such charter or certificate of incorporation, pay "an annual State corporation license tax," to the Auditor of the State, of two cents upon each one thousand dollars of its capital stock.

Section 65 provided that every foreign corporation which had theretofore obtained "the right and privilege to transact and carry on business within the limits of the State of Colorado shall, in addition to the fees and taxes now provided for by law, and as a condition precedent to its right to do any business within the limits of this State, pay annually . . ." a State license tax of four cents upon each one thousand dollars of its capital stock.

Section 66 provided that every corporation which should fail to pay the tax provided for in sections 64 and 65 (*supra*) should forfeit its right to do business within the State until the tax was paid, and should be deprived of all rights and privileges, and the fact of such failure might be pleaded as an absolute defense to any and all actions, suits or proceedings, in law or in equity, brought or maintained by or on behalf of such corporations, in any court of competent jurisdiction within the limits of the State, until such tax was paid.

This corporation refused to pay, and the State, through its District Attorney and Attorney General, commenced this suit for the purpose of forfeiting its right to remain in that State, unless and until it paid the money under the statute of 1902.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

It is conceded that the corporation has paid all its indebtedness for taxes or otherwise to the State of Colorado, except the amount demanded under the above-mentioned law of 1902, and that it has obeyed all the laws of the State with that exception. It is urged, however, upon the part of the corporation that, by its admission into the State, with its right to do business therein by the payment of the amount of money required for such purpose under the then existing law, a contract between the State and itself was thereby made that it should be permitted to remain therein during the term of life which the State by law allowed to corporations created by it, (which was twenty years,) without being again subjected to further exactions of money for what it had once paid for, viz., the right to remain and transact business in that State. Undoubtedly, if the corporation violated the laws of the State properly applicable to it, or if otherwise it gave just cause for its expulsion, it could not insist upon such a contract as a defense.

It is also conceded on behalf of the corporation that it is not entitled to any exemption from taxes which the State of Colorado can properly impose upon persons or corporations within her borders.

Having obtained permission to enter the State and do business as above mentioned the question, aside from that of the extent of the term, is whether any contract between the State and the corporation arose under these laws and the facts above mentioned.

In 1899, when this (foreign) corporation applied for a permit to enter and do business in the State, the laws of Colorado only granted such application on the payment of a certain fee named in the statute of 1897, which was payable upon filing its certificate of incorporation in the office of the Secretary of State of Colorado, and until that payment was made and the certificate filed no such corporation was permitted to have or exercise any corporate powers, nor was it permitted to do any business in the State. Section 30 of the act of 1901 provided that, upon payment of all taxes, etc., due under the law, the Secretary of State was to issue a certificate acknowledging the fact, for which the corporation was to pay a stated fee; and until the certificate was received from the Secretary of State by the corporation it should not exercise any corporate powers or do any business in the State, as provided for by the act of 1897.

The result of these statutes was that the foreign corporation, upon filing the proper papers and paying the statutory fees and obtaining the certificate to that effect from the Secretary of State, obtained the right to enter and do business in Colorado. The act of 1901 did not increase the amount of the exaction for entering and doing business in the State, but simply provided for a certificate, acknowledging payment, from the Secretary, and it imposed the payment of a small fee for such certificate. The right obtained was a right to enter the State and do business therein as a corporation. It was also subject by statute to the liabilities, restrictions and duties which were or might thereafter be imposed upon domestic corporations of like character. Domestic corporations at that time had the right to a corporate existence of twenty years.

These provisions of law, existing when the corporation applied for leave to enter the State, made the payment required and received its permit, amounted to a contract that the foreign corporation so permitted to come in the State and do business therein, while subjected to all, should not be subjected to any greater liabilities, restrictions or duties than then were or thereafter might be imposed upon domestic corporations of like character.

A provision in a statute of this nature subjecting a foreign corporation to all the liabilities, etc., of a domestic one of like character must mean that it shall not be subjected to any greater liabilities than are imposed upon such domestic corporation. The power to impose different liabilities was with the State at the outset. It could make them greater or less than in case of a domestic corporation, or it could make them the same. Having the general power to do as it pleased, when it enacted that the foreign corporation upon coming in the State should be subjected to all the liabilities of domestic corporations, it amounted to the same thing as if the statute had said the foreign corporations should be subjected to the same liabilities. In other words the liabilities, restrictions and duties imposed upon domestic corporations constitute the measure and limit of the liabilities, restrictions and duties which might thereafter be imposed upon the corporation thus admitted to do business in the State. It was not a mere license to come in the State and do business therein upon payment of a sum named, liable to be revoked or the sum increased at the pleasure of the State, without further limitation. It was a clear contract that the liabilities, etc., should be the same as the domestic corporation, and the same treatment in that regard should be measured out to both. If it were desired to increase the liabilities of the foreign, it could only be done by increasing those of the domestic, corporation at the same time and to the same extent.

Such being the contract, how long was it to last? Only until the State chose to alter it? Or was it to last for some definite time, capable of being ascertained from the terms of the statutes as they then existed? It seems

to us that the only limitation imposed is the term for which the corporation would have the right to continue in the State as a corporation. One of the restrictions as to domestic corporations is that which limits its corporate life to twenty years, unless extended as provided by law. The same restriction applies to the foreign corporation. (*Iron Silver &c. Co.* v. *Cowie*, 31 Col. 450.) Counsel for the State concedes that the corporation was admitted for a period of twenty years, but subject to the power of the State to tax. During that time, therefore, the contract lasts. This is the only legitimate, and we think it is the necessary, implication arising from the statute.

This is not an exemption from taxation, it is simply a limitation of the power to tax beyond the rate of taxation imposed upon a domestic corporation. Instead of such a limitation the act of 1902, already referred to, imposes a tax or fee upon or exacts from the foreign corporation double the amount which is imposed upon or exacted from the domestic one. The latter is granted the right to continue to do business upon the annual payment of two cents upon each one thousand dollars of its capital stock, while the former must pay four cents for the same right. This can not be done while the right to remain exists. It is a violation of the obligation of an existing valid contract. (*Home of the Friendless* v. *Rouse*, 8 Wall. 430.)

Nor is this a case where the power given by the State constitution to the general assembly to alter, amend or annul a charter is applicable. The act does not alter the charter or annul or amend it. It simply increases the taxation which up to the time of its enactment had been imposed on all foreign corporations doing business in the State.

A discussion as to the name or nature of the tax imposed by the act of 1902, or the former acts, is wholly unimportant with reference to the view we take of this case. After the payment of the money and the receipt of the permit to enter and do business in the State the corporation could not, as we have said, be thereafter further taxed than was the domestic one. The tax on the latter under that act is the same in substance and effect as that upon the foreign corporation, but it is for only one-half thereof in amount. The domestic must pay "an annual State corporation license tax," while the foreign corporation must pay "a State license tax" annually. The means of enforcing payment are not different, and such means are stated in section 66 of the act of 1902.

Whatever be the name or nature of the tax, it must be measured in amount by the same rate as is provided for the domestic institution, and if the latter is not taxed in that way neither can the State thus tax the foreign corporation.

It is unnecessary to refer to the many cases cited by both parties hereto. Some of them refer to the question as to the nature of such a tax, while

others decide, upon the facts appearing in them, whether there was a contract or not. As already stated, the name of the tax or its kind is not important so long as it is plain that the act of 1902 increases the liabilities of the foreign corporation over those which obtain in that of the domestic. And in regard to the cases of contract, while the principle that a contract may arise from a legislative enactment has been reiterated times without number, it must always rest for its support in the particular case upon the construction to be given the act, and in this case we are not greatly aided by the former cases regarding taxation and legislative contract. We may, however, refer to the following out of many cases regarding contracts as to taxation: *Miller* v. *The State*, (15 Wall. 478;) *Erie Railroad Co.* v. *Pennsylvania*, (153 U. S. 628;) *Power, Auditor,* v. *Detroit &c. Railway Co.*, (201 U. S. 543.)

Holding that the act of 1902 impaired the obligation of the contract existing between the corporation and the State, and is therefore void as to the corporation, it becomes unnecessary to decide the other questions discussed at the bar.

The judgment of the Supreme Court of Colorado is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

The CHIEF JUSTICE, Mr. Justice HARLAN, Mr. Justice HOLMES and Mr. Justice MOODY dissented.

True copy.

Test:

Clerk Supreme Court, U. S.